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SUPREME COURT, U.S.

80-5049

IN THE SUPREME COURT OF THE UNITED STATES

October Term

1980

CLIFFORD E. CLAYTON,

Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, and UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL NO. 509,

Respondents.

PETITION FOR WRIT OF CERTIORARI

to

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

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to

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES, AND TO THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioner, CLIFFORD E. CLAYTON, files this his Petition for Writ of Certiorari to review that portion of the judgment of the United States Court of Appeals for the Ninth Circuit which affirmed the judgment of the trial court in dismissing Petitioner's action against Respondents.

In support of the Petition, it is respectfully shown as follows:

OPINIONS BELOW

The opinion of the Court of Appeals has not been officially reported. It appears at 104 LRRM 2118. A copy of that opinion is attached as Appendix A. A copy of the Judgment and Findings of Fact and Conclusions of Law of the trial court is attached as

Appendix B.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The judgment and order of the Court of Appeals is dated and was filed April 14, 1980.

There was no rehearing ordered. The court below initally entered its judgment and filed its opinion September 4, 1979. ITT-GILFILLAN filed a Petition for Rehearing and Suggestion for Rehearing en Banc on September 18, 1979, and Petitioner filed his Response thereto, pursuant to the Court's order, on October 16, 1979. On April 14, 1980, the Court of Appeals entered its order withdrawing its opinion of September 4, 1979, and filing a revised opinion and judgment. The Petition for Rehearing was denied and the Suggestion for Rehearing en Banc was rejected.

Jurisdiction to review the judgment of the Court of Appeals by writ of certiorari is conferred by 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

Whether in a Vaca v. Sipes type action by an employee against his former employer and his union alleging his discharge in violation of the collective agreement and unfair deprivation of his arbitral remedy under that agreement, where the employee has not resorted to his internal union remedy and the union has asserted that as an affirmative defense, and where the employee contends that remedy is inadequate as a matter of law,

(1) the union has satisfied its burden of proof on the affirmative defense by evidence showing an internal appeals procedure which, as a matter of law, cannot in any circumstances either effect the employee's

reinstatement or restore his grievance to the arbitration process;

(2) the union has satisfied its burden of proof on the affirmative defense by evidence which failed to show that the internal appeals procedure can and does provide relief within the period prescribed by 29 U.S.C. §411(a)(4);

(3) the considerations relied upon by the court below for imposing exhaustion of internal remedies as a mandatory prerequisite are inappropriate and contain a high potential for complicating the employee's judicial remedy by circuity of action, piecemeal litigation and inconsistent adjudication.

STATUTES AND REGULATIONS INVOLVED

Labor Management Relations Act of 1947, as amended, § 301; 29 U.S.C. §185(a) and (c):

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> * * * * *
>
> (c) For the purposes of actions and proceedings by or against labor organizations

in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Labor Management Reporting and Disclosure Act of 1959, as amended, §101(a)(4); 29 U.S.C. §411(a)(4):

(4) No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: And provided further, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or

petition. (Emphasis in original.)

Federal Rules of Civil Procedure, Rule 42(b):

> (b) The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counter-claims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

STATEMENT OF THE CASE

This action was originally filed in the California Superior Court for Los Angeles County and removed to the United States District Court for the Central District of California. Jurisdiction is conferred upon that court by 29 U.S.C. §185 (a) and (c) and 28 U.S.C. §1331(a). This is a civil action wherein the amount in controversy, exclusive of interest and costs, exceeds $10,000.

Petitioner was discharged by his employer February 14, 1975, for reasons that do not appear in this record. He initiated this action Febrauary 5, 1976, against the employer, ITT-Gilfillan (hereafter "ITT") under Section 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §185, alleging the discharge to have been a breach of the collective agreement covering him, and against International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and Local No. 509 of the International (hereafter collectively "UAW"),

alleging breach by UAW of its duty fairly to represent him in failing and refusing to take to arbitration his discharge grievance.

Both ITT and UAW asserted as affirmative defenses Petitioner's failure to exhaust his internal union remedies. Petitioner contended that those remedies were inadequate as a matter of law and that the trial court should in its discretion not require his resort to or exhaustion of those remedies as a pre-condition to maintaining his action. Pursuant to Federal Rules of Civil Procedure, Rule 42(b), the trial judge ordered a separate trial on the issue of exhaustion as an issue potentially dispositive of the entire action.

After trial on that issue alone, the trial court determined that the internal remedies of the UAW, and in particular the appeal to its Public Review Board (hereafter "PRB"), were adequate to review and redress Petitioner's grievance and to grant a range of possible relief appropriate to his case. The Court found that Petitioner had failed to exhaust these remedies and dismissed his action against both ITT and UAW. Its judgment was entered May 19, 1977. Petitioner timely filed his notice of appeal to the Court of Appeals for the Ninth Circuit. By its judgment of April 14, 1980 that court affirmed the District Court's dismissal of the claim against UAW and reversed the dismissal of the claim against ITT. The case was remanded for trial on the issues of UAW's breach of its duty of fair representation and ITT's breach of the collective agreement.

Petitioner had been employed by ITT for over eight years and, since 1967, under a collective agreement between UAW and ITT which was in force at the time of his discharge. He timely filed a grievance in accordance with the provisions of that agreement. The grievance was duly processed through the three steps of the Grievance Procedure and a timely request for arbitration was

made. Thereafter, the International Representative servicing Local 509, and acting in its name, withdrew the request in a letter addressed to the Regional Office of the NLRB with which Petitioner had filed an unfair labor practice charge concerning his discharge. Petitioner's only notification of the dropping of his grievance was receipt of a copy of that letter.

The withdrawal of the request for arbitration effectively terminated Petitioner's grievance and finally closed to him the remedies available to him under the collective agreement. He took no steps to invoke the appeals procedure of UAW in relation to the latter's action.

The following briefly summarizes that procedure: In the case of an amalgamated local, such as Local 509, consisting of units each comprising a given employer's shop or premises, the first step in the appeals procedure is an appeal to the general membership meeting of the unit to which the aggrieved member belongs.

The next step is an appeal to the Amalgamated Local Union's delegate body or membership meeting. The third step is an appeal to the International Executive Board (hereinafter "IEB"). There are alternative courses of appeal from the IEB decision, to the Constitutional Convention Appeals Committee or to the PRB.

These provisions also require a member to exhaust all appeals before seeking redress from a civil court or governmental agency; UAW counsel, however, conceded at the trial that, by virtue of the Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. §411(a)(4)), the union's power to require exhaustion is limited to a maximum of four months.

The provisions of the UAW Constitution pertaining to the powers of the PRB are silent concerning the remedies it may order should it find the member's complaint justified. There were received in evidence two decisions of the PRB illustrating its

exercise of its powers. One shows that the PRB made a small award of back pay to an employee who did not wish to be reinstated to her former employment. The other shows an award of back pay to an employee who had been reinstated by his employer but who claimed he should have been permitted to return to work at an earlier date. It was stipulated at the trial that the PRB had, prior to Petitioner's discharge, awarded as a remedy to certain claimants invoking the procedures of the UAW Constitution, back pay for periods prior to the day of the PRB award. There is in evidence no decision addressing itself to the question of damages for future loss of earnings, whether as a substitute for reinstatement or otherwise. The record contains no policy statement emanating from the PRB, the UAW Convention Committee, the IEB or any other officer or body of the UAW, pertaining to the power of the appeals tribunals to award such prospective damages.

Under the collective bargaining agreement in effect at the time of Petitioner's discharge ITT's right to discharge employees covered by the contract was limited to instances of "just cause." A determination through the grievance procedure (including arbitration) that an employee was not discharged for just cause would result in his reinstatement without loss of seniority.

Seniority is defined as "the length of an employee's continuous service with the Company." Seniority applies to promotions, layoffs and recall rights, the right to replace a less senior employee in a lower paid job in case of layoff, shift transfers, bidding for jobs, vacations and sick pay. Benefits under the Pension Plan are directly keyed to length of service. The agreement also provides for automatic wage increases based on length of service and on annual rates negotiated by the UAW.

Other benefits incidental to employment under the collective bargaining contract include Group Insurance and Hospitalization,

paid holidays, bereavement pay upon the death of family members, and supplemental jury duty pay.

Petitioner was a shop steward from 1967 to his discharge in 1975. Shop stewards are elected, and as such they are entitled to seniority over all other employees in their respective areas of representation for purposes of layoff or transfer.

REASONS FOR ALLOWANCE OF THE WRIT

The statement of Questions Presented for Review, ante, sets forth important questions regarding the interpretation and application of federal labor law under §301 (29 U.S.C. §185), as declared in Vaca v. Sipes, 386 U.S. 171, 17 L.ed.2d 842 (1967), and Hines v. Anchor Motor Freight, Inc., 424 U.S. 544, 47 L.ed.2d 231 (1976), and by 29 U.S.C. §411 (a)(4). These questions deal with the circumstances in which an employee situated as described above can be denied his right to pursue Vaca v. Sipes relief. These questions also deal with the effectuation of the concern expressed in the above-cited cases for the individual worker who has to confront alone the bargaining process between collective parties far stronger than he, whose conflicting interests extend well beyond the merits of the employee's grievance. Argument supporting the importance of these questions and the need for their determination by this Court follows separately to each question.

Question 1. Whether, in the circumstances described above, the union has satisfied its burden of proof on the affirmative defense by evidence showing an internal appeals procedure which, as a matter of law, cannot in any circumstances either effect the employee's reinstatement or restore his grievance to the arbitration process.

On this issue, Petitioner's position is in the negative, because that remedy on its face and as a matter of law cannot

afford relief tantamount to his right under the collective agreement to reinstatement with full seniority and length-of-service related rights.

On this issue the circuits are divided. The Seventh Circuit has held that exhaustion of his internal union remedy is an inflexible prerequisiite to bringing the discharged employee's action against his union, whether or not the employee's claim was for relief beyond the power of the union to give. Baldini v. Auto Workers Local 1095, 581 F.2d 145 (C.A.7, 1978). Other circuits have held that resort to and exhaustion of the internal remedy is not a bar to the employee's action against the union where the union remedy is incapable of rendering the employee the full relief he would have been entitled to under the collective agreement. De Arroyo v. Sindicato Trabajadores, etc., 425 F.2d 281, 291 (C.A. 1 1970) -- the collective agreement remedy of reinstatement; Detroy v. American Guild of Variety Artists, 286 F.2d 75, 80 (C.A. 2 1961) -- where the union remedy was regarded as "dubious" in respect of an injury difficult to compensate for with a money award; Brady v. Trans World Airlines, 401 F.2d 87, 102 (C.A. 3 1968) -- the collective agreement remedy of reinstatement; Margetta v. Pam Pam Corp., 501 F.2d 179, 181 (C.A. 9 1974), and Fruit and Vegetable Packers v. Morley, 378 F.2d 728, 745 (C.A. 9 1969) -- the collective agreement remedy of reinstatement; -- Orphan v. Furnco Construction Corp., 466 F.2d 795, 801-802 (C.A. 7 1972) -- reinstating the employee's grievance to the grievance and arbitration processes of the collective agreement.

The court below actually aligned itself with the Seventh Circuit in Baldini, supra, and apparently abandoned its position developed in Margetta and Fruit and Vegetable Packers, supra. By reasoning that the union remedy was adequate here because all that petitioner could have gained against the union by judicial

action was money, the court below changed the standard from requiring that the union remedy be able to afford the contract remedy or its equivalent to merely noting that adequacy of the union remedy is to be measured only by what the union has the power to do. Such reasoning converts the inadequacy of the union remedy into the reason for requiring its exhaustion. It therefore makes exhausting the union remedy the same inflexible prerequisite to bringing the employee's action as did the Seventh Circuit in Baldini. The court below was mistaken in observing that "the courts can give no different relfef than that provided by the union." (Slip Opinion, p. 4, lines 12-14.) The court can award both money compensation and reinstatement, as has been clear since Vaca v. Sipes. It can do so with both the employer and the union before it, and thus can apportion its award both in accordance with the contribution of each to the employee's injury and with actual loss to the employee. As will be observed, post, without both parties before it the court may at the very least be unable to fashion its award so as to meet both of these objectives.

This is an issue which this Court has not resolved but should. Language concerning the employee's right to "equitable relief" in addition to monetary compensation, found in Vaca v. Sipes, 386 U.S. at 185-186, 17 L.ed.2d at 852, and Hines v. Anchor Motor Freight, Inc., 424 U.S. at 556, 47 L.ed.2d at 242-243, strongly indicates a resolution consistent with Petitioner's position here. But the division in the circuits shows the need for a decision that will afford guidance to trial courts and the bar.

Petitioner has contended throughout this litigation that the internal union remedy is inadequate to afford relief for an employee allegedly discharged in violation of the collective agreement. Under that agreement, a determination that an

employee's discharge was not for just cause would result in reinstatement without loss of seniority. UAW obviously has no legal right or power to order, through its Convention Appeals Committee or its PRB, that ITT reinstate Petitioner and restore his seniority and all its attendant rights. The UAW remedy is plainly no substitute for the arbitrator's power under the collective agreement; nor can that remedy restore Petitioner's grievance to the arbitral process under the collective agreement. ITT's obligation to arbitrate Petitioner's grievance under that agreement was exhausted when UAW dropped the grievance without arbitration. Plainly, UAW cannot compel ITT to agree to arbitrate it thereafter.

Moreover, a monetary award cannot compensate Petitioner for the loss of seniority and its attendant rights. Any job that has been held for a substantial period of time is unique, and the trial court so conceded. In the case of Petitioner, a black worker with all the disadvantages his race entails in the labor market,[1] this uniqueness has an especially intense quality. Petitioner had been employed by ITT for eight and one-half years. The seniority so built up entitled him to important benefits with respect to layoff, recall from layoff, length of vacation, and many other working conditions, all of which he lost. (See Statement of the Case, ante, pp. 8-9.) In addition, Petitioner also lost medical and hospitalization insurance for himself and

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1. U. S. Department of Labor Statistics show that the unemployment rate for black males averaged in 1975 nearly twice that of white males and thereafter has averaged considerally more than twice. In the first five months of 1980 the respective average rates were 10.2% and 4.7%. Employment and Earnings, U.S. Dept. of Labor, Vol. 22, No. 7, Vol. 24, No. 1, Vol. 25, No. 1, Vol. 26, No. 1, Vol. 27, No. 1, Vol. 27, No. 6.

his family, together with eight and one-half years of credited service under ITT's Pension Plan. He also lost the benefit of UAW representation in collective bargaining, which stands as an instrument for both extending his rights and privileges as an employee and defending those already gained. Because so many of these benefits turn upon Petitioner's length of service, they are unique and cannot be replaced through other employment. They can be provided only by ITT in the setting of its agreement with UAW.

Additionally, in his period of service Petitioner had developed a familiarity with the duties of his job, the procedures and routines of his employment, and the capacities and peculiarities of his co-workers and superiors, all of which undoubtedly made it possible for him to perform more satisfactorily and thus afforded some greater assurance of permanence in employment. He had developed associations and friendships with fellow employees. He had achieved a measure of recognition from them by reason of his having been selected and reelected as their shop steward beginning in 1967. All of these intangibles, taken together with the specific rights attendant upon his seniority under the UAW contract, make it clear that the trial court was right in saying that as to Petitioner, "there isn't anything like or equivalent to" his job at ITT.

Finally, a money award designed to compensate Petitioner for loss of this unique employment relation would be so speculative as to be unworkable and futile. For in these circumstances, the award would have to compensate him for not simply his lost earnings down to the time of the award. It would also be necessary to quantify his future losses over the balance of his work expectancy when he could no longer have the job security and other rights which his employment and length of service at ITT had earned for him. Note has already been made of the effect of seniority upon Petitioner's job security in cases of layoff and

right to recall when the work force is reconstituted. Similarly, reference has been made to the operation of length of service as a factor in promotion, wage increases, vacation, sick leave, lateral transfers. To determine Petitioner's loss from the deprivation of those rights and privileges entails comparing his expectable work history spent under the protection of the UAW-ITT agreement with his expectable work history in the employ of some other employer[s]. As to such substitute employment, there is no way of ascertaining whether it would be covered by any collective bargaining contract at all and, if it were, whether the terms of such contract would be different, and in what respects, from those of the contract here, especially as respects seniority protection in layoff, rehire, transfer, promotion, etc. One can be sure only that at a different employer, Petitioner's seniority from ITT would be unavailable and he would start at rung one of the seniority ladder.

In making such comparison, one would have to be able to predict with reasonable probability the frequency of Petitioner's foreseeable layoffs at ITT, given his eight and one-half years of seniority, and the likelihood and promptness of Petitioner's recall to employment after each such layoff. Similarly it would be necessary to predict a like employment history with a new employer and newly accumulated seniority. It is impossible to predict such events at all. They turn on matters over which the parties, and especially Petitioner, have no control; these matters include economic and technological developments and the vicissitudes of the business cycle, as well as the risks of

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business management, as to which proof is simply not available.[2]

In short, there is no competent evidence by which it could be shown what Petitioner's future earnings at I.T.T., under the protection of the UAW-I.T.T. contract, would be, as compared with his future earnings at some other place[s] of business with an unspecified seniority policy, if any.

It is the difference between these two that measures his damages. The two quantities cannot be ascertained with reasonable probability. Petitioner's damages from his discharge and loss of seniority are thus impossible to quantify.

Question 2. Whether the union in the circumstances described has satisfied its burden of proof on the affirmative defense by evidence which failed to show that the internal appeals procedure can and does provide relief within the period prescribed by 29 U.S.C. §411(a)(4).

On this issue Petitioner's position is in the negative because the statute, as interpreted and applied by this Court, merely gives the courts discretion to "stay their hand" for only four months. So read, the statute is not a grant of power to unions to require members to exhaust internal remedies, but a limitation on that power that allows them a brief period in which to consider the member's grievance. NLRB v. Ind. Union of Shipbuilders, 391 U.S. 418, 427, 20 L.ed.2d 706, 713 (1968).

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2. But it can be said that in the stage of erratic growth in the economy of the United States and the persistence of unemployment (particularly among blacks) since February 1975, when plaintfff was discharged, his seniority of eight and one-half years was of critical, if incalculable value. See, e.g., Economic Report of the President, January 1977, G.T.O. pp. 23-24; U. S. Department of Labor News (Bureau of Labor Statistics), published monthly from the period 1975 to date.

Petitioner submits that judicial discretion should not be exercised to require the employee to exhaust his internal remedy absent a showing that there is a reasonable likelihood that relief will be afforded within the four months period. Otherwise the exhaustion doctrine would be used to compel an idle act.

On this question there seems to be not only a conflict among the circuits but also within certain circuits. Those circuits which have applied the exhaustion of internal remedy principle to dismiss members' actions against their unions without express reference to the limitations of §411(a)(4) are: Baldini v. Auto Workers Local Union 1095, 581 F.2d 145 (C.A. 7 1978) -- the remedy sought was reinstatement to job with back pay; Fleming v. Chrysler, 575 F.2d 1187 (C.A. 6 1978) -- the remedy sought was back pay and restoration of seniority resulting from a discharge that had been remedied only by reinstatement; Brady v. Trans World Airlines, 401 F.2d 87, 104 (C.A. 3 1968) -- in that portion of the suit from which the member might have had remedy for the union alone for its conduct; Battle v. Clark Equipment Co., 579 F.2d 1338 (C.A. 7 1978) -- members sue for only money allegedly due under collective bargaining contract which the union had later amended by agreement with the employer; Imel v. Zohn, 481 F.2d 181 (C.A. 10 1973) -- cert. den. 415 U.S. 915, 39 L.ed.2d 469 -- after holding member had no excuse for failure to exhaust the internal remedy, the Court's footnote (p. 184, n. 7) states enigmatically, "Cf. exhaustion requirements in the Landrum Griffin Act, 29 U.S.C. §411"; Aldridge v. Ludwig-Honold Mfg. Co., 385 F. Supp. 695 (E.D. Pa. 1974) -- the member sought reinstatement to his job and the district court applied the exhaustion doctrine without reference to §411(a)(4) -- this decision was affirmed without opinion, 517 F.2d 1395 (C.A. 3 1975); cert. den. 424 U.S. 937 (1976).

There are eight circuits in which application of the

exhaustion doctrine has been qualified by the limitations prescribed in §411(a)(4). These include: Harris v. International Longshoremen's Assn., 321 F.2d 801, 804-805 (C.A. 3 1963) -- the member sought relief which the union could give; Semancik v. United Mine Workers of America, 466 F.2d 144, 151 (C.A. 3 1972) -- the member sought to enjoin the union's disciplinary proceedings [Harris and Semancik appear to be in conflict with Aldridge and Brady, supra; Wiglesworth v. Teamsters Local Union No. 592, 552 F.2d 1027, 1031-1032 (C.A. 4 1976) -- the member sought a remedy which the union could give, pertaining to conduct of union officers; Keene v. Int'l Union of Operating Engineers, 569 F.2d 1375, 1379 (C.A. 5 1978) -- the member sued the union under the so-called labor bill of rights; McCraw v. United Assn. of Journeymen, 341 F.2d 705 (C.A. 6 1965) -- member sought to enjoin union enforcement of a penalty, and member had not yet exhausted internal appeals procedure, but had carried same as far as he could at date suit filed; Buchholtz v. Swift & Co., 609 F.2d 317 (C.A. 8 1979), cert. den. 100 S.Ct. 672 -- action by member for money -- Court held exhaustion doctrine limited by §411(a)(4), but held against plaintiff on merits; Roth v. Int'l Brotherhood of Electrical Workers, 544 F.2d 1022, 1024 (C.A. 9 1976) -- member sued to prevent union from disciplining him for bringing suit against it -- the Court held that §411(a)(4) applied to all suits by members against their union; Operating Engineers Local Union No. 3 v. Burrough, 417 F.2d 370 (C.A. 9 1969), cert. den. 397 U.S. 916 -- action similar to that in Roth and same result [Roth and Operating Engineers appear to be in conflict with the case at bar wherein §411(a)(4) was not applied to the exhaustion requirement imposed upon Petitioner]; Winter v. Local Union No. 639, 569 F.2d 146 (D.C. Cir. 1977) -- action v. employer and union seeking money damages and injunction requiring union to process grievances non-discriminatorily -- in

determining application of exhaustion doctrine, Court applies §411(a)(4).

In holding that Petitioner should have exhausted his union remedy as a prerequisite to maintaining his action against the union, the court below appears to have ignored utterly §411(a)(4). It clearly did not limit the sweep of its holding by any application of that section or even any mention of it. Its reasoning that the union tribunal "would have elicited" the "reasons for the withdrawal of the arbitration request" (Slip Op., p. 4, lines 23-31) gives strong indication that the court contemplated a time period for exhaustion far in excess of four months. For the UAW Constitution gives no indication that the appeal will be determined within four months, or that, within such time period, there will emerge any findings of fact that could provide the court with the assistance it sought.

The UAW Constitution requires that a challenge to a local union's decision be made within 30 days, and the local union has 45 days thereafter in which to act. Appeal from adverse action by the local union, or its inaction, goes to the IEB. There is no time limit within which the IEB must act. Appeal lies to the PRB only after the IEB has rendered its decision, and there is no time limit within which the PRB must act. Likewise, appeals to the Convention and Issue Appeals Committee are taken only after IEB action; there is no time limit on the action of that Committee. There is thus no constitutional guarantee that the appeal procedure will eventuate in any correction within four months of the time that it is invoked, nor is there any protection against inordinate delay at the IEB and PRB levels.

The only other evidence shedding any light on the time within which the employee might get relief through the internal remedy consists of two opinions of the PRB. One of these was rendered four years, two months, and 20 days from the date of the local

union's action complained of. The other came down one year and three months after that date. In neither case had any self-correction emanated from the UAW appeals procedure within four months of the member's resort to it. From the evidence, then, it appears that the only fact finding in the appeals process is in the opinions of the PRB, and its decisions are not to be expected until long after the end of the four months period prescribed in §411(a)(4).

There are thus presented in the administration of the federal labor law grave policy considerations involving the protection of the individual in the collective process, and the likelihood that his economic exhaustion will long precede completion of the union appeals procedure. This Court has voiced concern over the potential for oppressive abuse in the unions' power to bar their members from access to courts through the internal remedy device. NLRB v. Shipbuilding Local 22, 391 U.S. 418, 426427, 20 L.ed.2d 706, 713-714 (1968). A District Judge has pointedly noted the problem. Dorn v. Meyers Parking Systems, 385 F.Supp. 779, 782-783 (E.D. Pa. 1975). This Court's recognition of the general problem of preserving the rights of the individual worker, where the union has exclusive powers as the collective bargaining representative, has been expressed in Vaca v. Sipes, 386 U.S. at 182, 17 L.ed.2d at 853, and in Hines v. Anchor Motor Freight, Inc., 424 U.S. at 56-565, 47 L.ed.2d at 241-242. The reduction through unemployment of the worker's already limited resources, his need to find work, the not remote chance that new work will take him to new areas and different employer-union situations, his inability to retain legal assistance are likely to lead to abandonment of his remedy in favor of more immediate and pressing needs, if not sheer inability to pursue them further.

Question 3. The considerations relied upon by the court below for imposing exhaustion of internal remedies as a mandatory

prerequisites are inappropriate and contain a high potential for complicating the employee's judicial remedy by circuity of action, piecemeal litigation and inconsistent adjudication.

The opinion below holding exhaustion to be mandatory rests upon four considerations: (a) Provisions of the union constitution forbidding members' suits against the union before all internal remedies are exhausted are contractual obligations upon the member which are "mandatory;" (b) The decision of the union appeals procedure would aid the court in determining the breach of the duty of fair representation aspect of the case; (c) The union remedy of mere money is not inadequate because Petitioner could at best have recovered only money from the union; and (d) Enforcing the exhaustion requirement would forestall "unnecessary interference" with union affairs.

None of these has merit and, taken together, they will lead to a circuity of action, piecemeal litigation and inconsistent determinations in those cases where the employee's relief must be obtained from both the employer and the union.

That the union constitution places an absolute bar upon suits against the union until the internal remedy has been exhausted is plainly a violation of 29 U.S.C. §411(a)(4). That statute forbids a union to require a member to exhaust the internal remedy beyond a period of four months before he sues the union. The union's constitutional provisions must be read in the light of §411(a)(4), McCraw v. United Assn. of Journeymen, 341 F.2d 705 (C.A. 6 1965), and are subordinate to its mandate, Richardson v. National P. O. Mail Handlers, 442 F.Supp. 188, 191 (ED Va. 1977).

The second consideration relies upon assumptions for which there is no factual basis in this record. There is nothing which informs as to whether at any stage of the union procedure (other than a PRB opinion, which could be expected years after the conduct complained of) there would be any factual analysis or

application of internal union "law" which could be of guidance to the Court. Nor is there anything concerning the nature of the appeals process from which the utility of any such determination could be evaluated. One cannot learn from this record how the issues are framed in such proceedings, how the record is adduced, or whether (other than a decision by the PRB) there are written decisions analyzing the evidence and the facts. There is nothing to indicate the fairness of the procedure, particularly whether the aggrieved employee has had a full opportunity to prepare and present his case that he was treated unfairly. There is, therefore, no basis in this record for assuming that the UAW procedure would generate anything useful in a judicial proceeding concerning the union's breach of its duty of fair representation.

This consideration also raises grave questions concerning the relationship in the judicial process between the union proceeding dealing with the employee's internal appeal and the judicial proceeding dealing with the employee's action against the employer. Would the issue of the union's breach of its duty of fair representation be litigated twice, both before the union tribunal, and before the Distrct Court? Or would the District Court "stay its hand" until it could receive guidance from the union tribunal's decision. If the latter, on the record here, the District Court would wait far longer than §411 (a)(4) permits. If the former, the employer would be placed under oppressive burdens and there would be a gross waste of judicial time. Further, there is a substantial risk that there would be inconsistent decisions, with consequent uncertainty as to the employee's rights.

The third consideration raises similar questions of judicial economy and inconsistency. That the union remedy affords all it is legally able does not dispose of its failure to afford the employee reinstatement. This limitation upon the union's remedy

simply points to the fact that to require the employee to exhaust it places on him the burden of litigating with the employer and with the union, separately but on the same facts, his right to reinstatement. This consideration presents the same consequence of duplicative litigation and inconsistent results already discussed.

The fourth consideration for the mandatory precondition presents a choice between competing policies. In the other side of the scale from avoiding unnecessary interference in union affairs are the concerns, voiced in Vaca and Hines, to protect the individual worker from oppression and injustice in a collective bargaining process between forces that are, in comparison with him, economic giants, as well as the need to avoid duplicative litigation, potentially inconsistent determinations, and burdensome delay violative of §411(a)(4). The balance would seem to be heavily on the side of the last enumerated concern.

The considerations guiding the exercise of judicial discretion in applying the exhaustion of internal remedy in the areas just covered need a more finely tuned articulation. The union constituion requirement of exhaustion should not be mandatory unless it gives substantial and reasonable promise (supported by a record of achievement) of a final and authoritative determination within the period prescribed in §411(a)(4). The union determination of the employee's claim should be considered by the Court only if the union procedures are fair on their face and provide for the employee's right to counsel of his choice, a defining of issues, opportunity for the employee to present his evidence and confront and cross-examine the witnesses and other evidence against him, and a written reasoned decision based upon the factual record. The District Court should in no case be bound by the determination of the

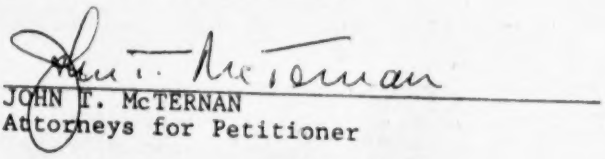
union tribunal but be free to determine the controversy in accordance with the standards applicable under the federal labor law developed under §301. The District Court should have the power to fashion the remedy applicable to employer and union, so as to assure neither overcompensation to the employee nor inadequacy of the final remedy.

Finally counsel have been authorized to voice to this Court the statement by the trial judge of his satisfaction that both ITT and Clayton were filing petitions for certiorari and his hope that this court would afford clarification on these "troublesome" questions.

CONCLUSION

For all of the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,



JOHN T. McTERNAN
Attorneys for Petitioner

July 10, 1980.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLIFFORD E. CLAYTON, Appellee, vs. ITT GILFILLAN, etc., et al., Appellant.	)	No. 77-2756
CLIFFORD E. CLAYTON, Appellant, vs. ITT GILFILLAN, etc., et al., Appellee.	)	No. 77-2763 O R D E R

FILED

APR 14 1980

RICHARD H. DEANE
CLERK U.S. COURT OF APPEALS

Before: GOODWIN and KENNEDY, Circuit Judges, and TAYLOR,* District Judge

The opinion filed herein on September 4, 1979, is withdrawn and the clerk is directed to file the attached revised opinion.

With the filing of the revised opinion, the panel votes to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and of the panel's revised opinion, and no judge has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b) and G.O. 5.3.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

*The Honorable Fred M. Taylor, United States District Judge for the District of Idaho, sitting by designation.

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RICHARD H. DEANE
CLERK U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLIFFORD E. CLAYTON, Appellee, v. ITT GILFILLAN, etc., et al., Appellant.	No. 77-2756
CLIFFORD E. CLAYTON, Appellant, v. ITT GILFILLAN, etc., et al., Appellee.	No. 77-2763 REVISED OPINION

Appeal from the United States District Court
for the Central District of California
Irving Hill, Chief Judge, Presiding
Argued and submitted April 4, 1979
Opinion filed September 4, 1979

Before: GOODWIN and KENNEDY, Circuit Judges,
and TAYLOR*, District Judge.

GOODWIN, Circuit Judge:

Clayton, a discharged employee, appeals from a district court judgment dismissing his action against ITT-Gilfillan for wrongful discharge under section 301 of the Labor Management Relations Act (29 U.S.C. § 185) and against his union for breach of its duty to represent him. We affirm the dismissal in favor of the union, but reverse the judgment in favor of the employer.[1]

For alleged misconduct not material here, ITT fired Clayton in February 1975. As a member of the United Auto

*The Honorable Fred M. Taylor, United States District Judge for the District of Idaho, sitting by designation.

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Workers (UAW), Clayton was entitled under a collective bargaining agreement to seek reinstatement. He took the first step under the contract, a formal request for reinstatement, but the company denied his request. Clayton's local union then filed a timely grievance, but again the company refused to reinstate him. The union representative next made timely demand under the terms of the collective bargaining agreement for arbitration of the grievance. For reasons not stated in the record, however, the union eventually withdrew the request for arbitration.

Clayton was notified of the local official's decision not to press for arbitration. Under Article 33 of the union constitution, a member who is not satisfied with the handling of his grievance may appeal to the local's delegate body or general membership meeting. Appeal from either group's decision may next be taken to the International Executive Board. The unsatisfied member may then appeal the Board's decision to the Constitutional Convention Appeals Committee, or in some cases to the Public Review Board (PRB) established in Article 32 of the union's constitution.

Article 33, section 12, of the union constitution requires any member who feels aggrieved by any action of the local to exhaust his constitutional remedy before appealing to a civil court or governmental agency for redress.

Clayton admits that he did not exhaust his union remedies. He did not appeal the union official's decision not to proceed to arbitration even to the first appellate level provided in Article 33. Instead, he brought this action in federal district court several months later.

Both the union and ITT asserted as affirmative defenses Clayton's failure to exhaust his union remedies. under Fed. R. Civ. P. 42. The court found that (1) Clayton had failed to exhaust his remedies, (2) the remedies available to Clayton through the union appeals process were adequate to redress his grievance, and (3) exhaustion of internal remedies could not be excused as futile. As a matter of law, therefore, the district court held that Clayton could not maintain an action against either defendant.

1. The union's exhaustion defense.

The exhaustion of internal remedies as a condition of maintaining an action against the union is a matter of judicial discretion.[2] Buzzard v. Local Lodge 1040, 480 F.2d 35, 41 (9th Cir. 1973); Keeffe Brothers v. Teamsters Local No. 592, 562 F.2d 298, 302-03 (4th Cir. 1977) (citing cases). Relying principally on Buzzard and Newgent v. Modine Manufacturing Co., 495 F.2d 919 (7th Cir. 1974), the district court held that Clayton's failure to exhaust his union remedies as required by the union constitution prevented him from suing the union. We agree.

There is no question that Article 32, section 12, of the union constitution made exhaustion mandatory here. Exhaustion is excused only if the remedies available are inadequate or if resort to the internal procedures would be futile. Buzzard v. Local Lodge 1040, supra, 480 F.2d at 41; Baldini v. Local No. 1095, 581 F.2d 145, 149 (7th Cir. 1978).

Clayton contends that the internal appeals process was inadequate because the union could not reinstate him to his job. The union could "only" award him money for any wrong it had caused, he complains.

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Many courts examining the same internal remedies as those provided to Clayton have found them fair and adequate. See Baldini v. Local No. 1095, 581 F.2d at 149 (citing cases). In Baldini, the Seventh Circuit upheld the UAW procedures against an objection identical to that raised by Clayton. The ability to award only money damages does not make the process inadequate; relief against the union in the civil action Clayton now brings would give him no more. A primary reason for requiring exhaustion is to forestall unnecessary interference with union affairs. Brady v. Trans World Airlines, Inc., 401 F.2d 87, 104 (3d Cir. 1968), cert. denied, 393 U.S. 1048 (1969). It follows that exhaustion makes especially good sense when the courts can give no different relief than that provided by the union.

More important in this case is the aid that exhaustion would have furnished the courts in deciding Clayton's claim against the union.

> "A primary reason for the existence of the exhaustion doctrine is that prior union action interpreting union rules and perhaps also further refining and defining the problem may well assist the court when it is later called upon to resolve the controversy." Buzzard v. Local Lodge 1040, 480 F.2d at 41.

The UAW's liability (if any) for breach of its duty of fair representation would depend on the reasons for the union's withdrawal of the arbitration request. There is little in the record to indicate why the local official changed his mind and withdrew the arbitration request. But the missing motive is precisely the sort of information that an appellate body within the union would have elicited, compiling a record that would greatly assist the court now.[3]

For all these reasons, the district court acted well within its discretion when it dismissed Clayton's claim against the union for failure to exhaust. Clayton failed to give his union the opportunity to reverse itself. He cannot obtain by judgment now what he would not allow the union an opportunity to afford him under its constitution.

2. Claim against the employer.

We next consider whether, as the district court held, Clayton's failure to exhaust internal union remedies barred his action against his employer for wrongful discharge. This circuit has discussed the validity of the employer's asserted exhaustion defense in dictum, but it has never directly decided the issue.[4] We now find that if a claimant, by exhausting internal union remedies, could not obtain the same relief sought in a civil action against an employer, the employer may not raise the failure to exhaust internal remedies as a defense.

While exhaustion of union remedies is not a condition precedent to maintaining an action against an employer, the employer is protected to a substantial degree by the exclusivity of the collective bargaining agreement's arbitration remedy. Exhaustion of the remedies provided in the agreement is required prior to a breach-of-contract action when those remedies are exclusive. Vaca v. Sipes, 386 U.S. 171, 184 (1967).[5] Remedies are presumed to be exclusive where, as here, the parties to the agreement do not expressly provide that the grievance and arbitration procedures are not the exclusive remedy. Republic Steel Corp. v. Maddox, 379 U.S. 650, 657-58 (1965).

The requirement of exhaustion of collective bargaining remedies may thus bar an employee's action against an

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employer. Otero v. Electrical, Radio and Machine Workers, 474 F.2d 3 (9th Cir. 1973). It is typically the employee's union, however, and not the employee himself that controls initiation of arbitration or other remedies. Therefore, an exception to the exhaustion doctrine is recognized. Where, as here, the union has sole power to invoke arbitration, the employee can obtain judicial relief for breach of the employment contract only if he first shows that the union wrongfully refused to seek arbitration. Vaca v. Sipes, 386 U.S. at 185. See also Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976); Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971); Beriault v. Local 40, 501 F.2d 258 (9th Cir. 1974). To be wrongful, however, the failure must be "arbitrary, discriminatory, or in bad faith." Vaca v. Sipes, 386 U.S. at 190.

The instant case differs from Vaca and Hines, the leading cases in this area. The employee's failure to exhaust against the union was not an issue in those cases. In both, the discharged employee faced no exhaustion barrier to union liability for failure to represent him. Here, ITT contends that Clayton's failure to exhaust his intraunion remedies precluded a showing that the UAW's failure to prosecute his grievance was "wrongful," barring his action for wrongful discharge.

It is initially useful, in determining the applicability of an exhaustion defense in this context, to distinguish two types of exhaustion requirements and the policies underlying each. The first, discussed above, requires union members to pursue all remedies under a union's constitution and bylaws before bringing actions against the union. As noted, this exhaustion requirement

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prevents unnecessary judicial interference in union disputes and conserves judicial resources.

The second type of exhaustion requirement compels unions or individual employees to follow all grievance procedures under a collective bargaining agreement before resorting to judicial remedies against employers. Exhaustion under the collective bargaining agreement prevents parties to the agreement from "short-circuiting" an agreed upon grievance procedure by resort to the courts. This is consistent with the policy preference, declared in section 203 of the Taft-Hartley Act, that, if at all possible, labor disputes should be resolved within the framework of procedures approved under collective bargaining, rather than in the courts. 29 U.S.C. § 173(d). This primary commitment to private dispute resolution has been emphasized in a series of landmark Supreme Court labor decisions. See, e.g., Hines v. Anchor Motor Freight, Inc., supra; Vaca v. Sipes, supra; Republic Steel Corp. v. Maddox, supra.

There are good reasons, then, for requiring union members to exhaust procedures under union constitutions or bylaws before bringing actions against unions and for compelling employees to fully pursue collective bargaining remedies before bringing judicial action against employers. But are there good reasons for transferring the intraunion exhaustion requirement from the union member versus union context to cases in which employees sue employers for wrongful discharge?

In support of this extension, ITT argues that if an employee does not exhaust internal union remedies, he or she is estopped from showing that the union acted

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"wrongfully," as is required by Vaca and Hines. The company claims that if Clayton had pursued his internal remedies after the union had declined to process his grievance, the UAW might have reversed itself and the Vaca-Hines union "wrongfulness" standard would not have been satisfied. This argument was most cogently described in Brookins v. Chrysler Corp, 381 F Supp. 563, 568-69 (E.D. Mich. 1974):

> "By exhausting his internal remedies the employee may be able to eliminate the very wrong of which he complains, not merely obtain a remedy therefor in another forum. If the union's wrongful refusal to continue the grievance were reversed without prejudice to his rights, the employee would no longer have a cause of action for breach of the duty of fair representation, and consequently would have no right under Vaca to sue his employer for breach of contract." 381 F.Supp. at 569.

We find this analysis persuasive. But it does not apply in instances when the employee, by exhausting intraunion remedies, would not "be able to elimimate the very wrong of which he [or she] complains." That is the case here.

The rationale for requiring a showing of "wrongful" conduct in the Vaca-Hines context, as noted, is to prevent the circumvention of collectively bargained grievance procedures. A party should be barred from seeking in court what might still be obtained through private contractual remedies. Allowing the employer to raise intraunion exhaustion as a defense, if exhaustion could have resulted in a claimant obtaining the same relief he or she seeks in a civil action, promotes private dispute resolution.[6] Accordingly, the employer's exhaustion defense is properly recognized in those circumstances.

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If, however, an aggrieved party cannot obtain adequate relief through contractual or internal grievance procedures, the dispute resolution rationale is inapplicable. There is no reason, consistent with Vaca, Hines, et al., to require exhaustion if, regardless of the outcome of a full grievance procedure, a claimant will be compelled to resort to judicial process.

Here, once the union withdrew its petition for a hearing on his grievance, Clayton lost any opportunity he might have had for reinstatement through the contractual grievance process. Even if Clayton had successfully appealed the withdrawal of the hearing request and the union had reversed itself and found that it should have processed his grievance, the union's public review board could do no more than award him damages for breach of its duty of fair representation. It could neither reinstate Clayton nor reinstate his petition and prosecute his grievance action. We conclude that Clayton's claim against ITT was not barred by failure to exhaust such insufficient remedies. See Winter v. Local 639, Int'l Brotherhood of Teamsters, 569 F.2d 146, 150-51 (D.C. Cir. 1977); Harrison v. Chrysler Corp., supra. Accord, Margetta v. Pam Pam Corporation , 501 F.2d 179, 180 (9th Cir. 1974); Fruit & Vegetable Packers, Local 760 v. Morley, 378 F.2d 739, 745 (9th Cir. 1967).

Conditioning the employer's use of the internal exhaustion defense on the adequacy of internal union remedies produces an anomaly. Where the employer raises the affirmative defense of failure to exhaust the contract's dispute resolution machinery, and where the employee has failed to exhaust internal union procedures, the employer will be required to defend the union's representation of its

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members. In an action from which the union has been dismissed, ITT, to prevail on its affirmative defense, must defend the UAW's good faith in declining to prosecute Clayton's grievance.

We are aware of the anomaly. But we have not been directed to any authority that would permit the employer to escape liability if the trier eventually finds that the employee did not receive the minimum representation his union owed him. On the contrary, the cases compel the result we reach.

In Vaca, the Supreme Court said that the union's wrongful refusal to process a grievance could not defeat the employee's right to judicial relief against the employer, even though "the employer in such a situation may have done nothing to prevent exhaustion of the exclusive contractual remedies to which he agreed in the collective bargaining agreement." 386 U.S. at 185. This means that the protection afforded to an employer by the collective bargaining agreement is conditional on the union's discharge of its duty to represent an employee fairly. Hines v. Anchor Motor Freight, Inc., 424 U.S. at 571. The Court recognized that this in turn means courts will have to pass on whether there has been a breach of the duty of fair representation in actions for breach of the employment contract. Vaca v. Sipes, 386 U.S. at 187.[7] To hold here that Clayton has no cause of action against ITT because of his union's failure to proceed to arbitration would run counter to the basic principles of Vaca and Hines.

We must therefore remand this case. ITT will be liable only if (a) the union's withdrawal of its demand for arbitration was wrongful, as that term has been construed in

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Vaca, Hines, and other cases, and (b) Clayton's discharge was a breach of contract. See Hines v. Anchor Motor Freight, Inc., 424 U.S. at 570-71.[8]

We note also that, although the union will incur no liability because of Clayton's failure to exhaust internal remedies, the extent of the union's wrong (if any) can affect the relief granted against ITT.

> "If a breach of duty by the union and a breach of contract by the employer are proven, the court must fashion an appropriate remedy. Presumably, at least in some cases, the union's breach of duty will have enhanced or contributed to the employee's injury. * * * The governing principle, then, is to apportion liability * * * according to the damage caused by the fault of each." Vaca v. Sipes, 386 U.S. at 187, 197.

See also Hines v. Anchor Motor Freight, Inc., 424 U.S. at 572-73 (Stewart, J., concurring). Hampered as we are by the lack of information about why the union dropped its arbitration demand, we can offer no better advice to the district court on remand.

Reversed and remanded for trial on the claim against the employer only. The judgment dismissing the claim against the union is affirmed.

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FOOTNOTES:

[1] Defendant ITT also cross-appeals from the district court's refusal to strike plaintiff's prayer for attorney's fees, punitive damages and damages for emotional distress. This was neither a final judgment under 28 U.S.C. § 1291 nor an interlocutory order appealable under 28 U.S.C. § 1292. It is therefore not reviewable at this time.

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[2] Some courts have found that the duty of a union to represent its members arises from tort or contract law, but we have held that the duty of fair representation is a matter of federal statute. Price v. Southern Pacific Transportation Co., 586 F.2d 750, 753 (9th Cir. 1978); see also Retana v. Apartment, Motel and Hotel Elevator Operators, Local No. 14, 453 F.2d 1018, 1021-22 (9th Cir. 1972). Judicial discretion to require exhaustion derives from 29 U.S.C. § 411(a)(4), which says:

> "No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency * * * : Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof * * * ." (Emphasis added.)

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[3] The policies warranting a requirement of exhaustion of intraunion remedies in suits between union members and unions or union officers were succinctly described in Simpson & Berwick, "Exhaustion and the Individual Employee," 51 Tex. L. Rev. 1179 (1973):

> "Conservation of judicial rescources was one policy underpinning the doctrine. Also, courts agreed that administrative filtration served to sharpen grievances for eventual judicial resolution, assisting judges faced with unfamiliar rules and practices. Moreover, requiring resort to internal private remedies was thought to stimulate unincorporated associations to establish honest, democratic grievance procedures. Finally, some courts feared that a contrary rule would encourage a flood of litigation, sapping the effectiveness of internal procedures." Id. at 1216-17.

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[4] In Retna V. Apartment, Motel and Hotel Elevator Operators, Local No. 14, 453 F.2d 1018 (9th Cir. 1972), the court explicitly stated that an employer could not raise the intraunion exhaustion defense, but this statement is included in a footnote which ITT properly chracterizes as "dictum." Id. at 1027 n. 16. See Winter v. Local No. 639, Int'l Brotherhood of Teamsters, 569 F.2d 146, 150 n. 22 (D.C. Cir. 1977), and Simpson & Berwick, supra, note 3, at 1223, n. 212, (both referring to Retana footnote 16 as "dictum"). It should be noted, however, that Retana footnote 16 has been cited by other courts for the proposition that an employer cannot raise the intra-union exhaustion defense. See Fitzer v. Safeway Stores, 586 F.2d 182, 184 (10th Cir. 1978); Harrison v. Chrysler Corp., 558 F.2d 1273, 1278 (7th Cir 1977).

We also note that in Kepard v. International Harvester Co., 581 F.2d 764 (9th Cir. 1978), our court affirmed the dismissal of an employee's claim against his union because he had failed to exhaust his intraunion remedies, but reached the merits of the employee's claim against his employer for back pay. There is no indication, however, that the company attempted to raise Keppard's failure to exhaust as a defense. The opinion does not refer to, much less reject, any reliance by the employer on an internal exhaustion defense.

---

[5] Most of those parts of Vaca v. Sipes concerning employee section 301 actions for wrongful discharge are dicta. See 386 U.S. at 199-202 (Fortas, J., concurring). The holding in Vaca concerned only the federal courts' jurisdiction of employee causes of action against a union for failure to represent. But we have indicated that we agree with Vaca's discussions relating to claims against an employer. Margetta v. Pam Pam Corp., 501 F.2d 179, 180 (9th Cir. 1974).

---

[6] The Seventh Circuit recognized and thoughtfully described the reasons for allowing the employers to raise a qualified intraunion exhaustion defense in Harrison v. Chrysler Corp, 558 F.2d 1273 (7th Cir. 1977):

> We are not persuaded, however, that exhaustion of intraunion remedies is never a

FPI—Sandstone
11-29-76—5014—CCH

legitimate concern of the employer. In Orphan v. Furnco Construction Corp., supra at 801, we gave serious consideration to an employer's argument that permitting it to raise the defense would facilitate the national labor policy in favor of the private adjustment of grievances. That argument has some merit. Under certain circumstances an employee's appeal within the union, after a union official's bad faith refusal to press his grievance, might place the grievance procedure back on its proper course. A rule requiring such action would directly and substantially benefit the employer by enabling it to rely on the integrity of the grievance procedure in all cases in which it has not been irretrievably spoiled by the union's unfair representation.

"The question presented is whether the employee owes an obligation to the employer to exhaust available methods of reviving a stalled grievance procedure before abandoning that procedure and resorting to the courts for relief. We believe such an obligation is implied under a collective bargaining agreement which, like the one in this case, reposes in the union exclusive authority to represent the employee in contractual claims against the employer and which provides grievance machinery as the exclusive method of resolving those claims. It is clear that such provisions may not preclude the employee from seeking judicial relief independently if the union irreversibly defaults on its obligation to represent him fairly. Hines v Anchor. Motor Freight, Inc., supra at 567, 96 S.Ct. 1048. However, no valid reason appears for relieving the employee from the operation of these provisions, requiring his reliance on the union for representation and the grievance procedure for relief, so long as the procedure remains viable and fair representation can be obtained. Intraunion appellate procedures may be a method by which fair representation may be regained and the grievance procedure revived. The employer may properly assert that the employee has an obligation under the collective bargaining agreement to resort to intraunion appellate procedures for this limited purpose. To raise this defense, however, the employer must establish that an intraunion appeal could result in reversal of the union's refusal to press the grievance and that the grievance could be reinstated in accordance with the provisions of the collective bargaining agreement. Orphan v. Furnco Construction Corp., supra at 801. Moreover, even where such an opportunity exists, the employee may be relieved of the exhaustion requirement where resort to the intraunion appellate procedures would be futile. Id. at 802." Id. at 1278-79

FPI—Sandstone
11-20-74—5034—GD

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[7] The necessity of reviewing the union's activities in trying a claim against the employer was a main reason for Mr. Justice Black's dissent in Vaca. "Henceforth, in almost every § 301 breach-of-contract suit by an employee against an employer, the employee will have the additional burden of proving that the union acted arbitrarily or in bad faith." 386 U.S. at 210.

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[8] The Sixth Circuit reaches the same conclusion in a similar situation. In Smart v. Ellis Trucking Co., Inc., 580 F.2d 215 (6th Cir. 1978), a discharged employee brought an action against his union for breach of the duty of fair representation, against his former employer for wrongful discharge under section 301, and against both for conspiracy. The conspiracy and unfair representation claims were barred by the statute of limitations. This left the section 301 claims against the employer. The court noted that the company could only be liable if the employee showed that the union had acted wrongfully under the test of Hines as a prerequisite to his section 301 claim. The company would therefore defend on the basis of union conduct when the statute of limitations guaranteed the nonappearance of the union as a party. But dismissal of the claims against the union was held irrelevant to the employee's ability to proceed against the employer. 580 F.2d at 218-19.

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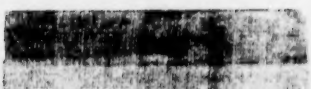
FPT—Sandstone
11-29-76—30M—632

APPENDIX B

Judgment and Findings of Fact and Conclusions of Law



Attorneys for Defendants

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CLIFFORD E. CLAYTON, Plaintiff, -vs- ITT GILFILLAN, A Division of International Telephone and Telegraph Corporation, a Corporation; INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, an unincorporated labor organization; UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL UNION NO. 509, an unincorporated labor organization, Defendants.	CIVIL NO. 76-0730-IH PROPOSED JUDGMENT

The above-entitled matter having come on for trial before this Court on May 3, 4, and 5, 1977, Plaintiff CLIFFORD E. CLAYTON, being Represented by John McTernan of Margolis, McTernan, Scope and Sacks, Defendant Unions' being represented by Matthew B.F. Biren and Lawrence Rosenzweig of Levy, Kosadin, Goldschmid and Sroloff, Defendant ITT Gilfillan being represented by Everett F. Meiners and Kenneth J. Florence of Parker, Milliken, Clark and O'Hara, and

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the Court having considered all the testimony and documentary exhibits, as well as oral argument, and having made Findings of Fact and Conclusions of Law.

IT IS HEREBY ADJUDGED AND DECREED that judgment shall be entered in favor of Defendant UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW and its affiliated LOCAL 509 and Defendant ITT GILFILLAN and Defendants shall be awarded costs of suit.

DATED: MAY 27, 1977

UNITED STATES DISTRICT JUDGE

PROOF OF SERVICE

I am a citizen of the United States, over the age of 18 years, residing or employed in the County of Los Angeles, and not a party to the within action; my business address is:

3550 Wilshire Boulevard, Suite 1020, Los Angeles, CA. 90010

On May 13, 1977, I served a true copy of the attached:

PROPOSED JUDGMENT

on the Plaintiff in said action, by hand delivering a true copy thereof enclosed in a sealed envelope addressed as follows:

John McTernan, Esq.
Margolis, McTernan, Scope & Sacks
3600 Wilshire Boulevard, Suite 2200
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Everett J. Meinerz, Esq.
PARKER, MILLIKEN, CLARK & O'HARA
27th Floor-Security Pacific Plaza
333 South Hope Street
Los Angeles, California 90071

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on May 13, 1977 at Los Angeles, California.

JAY TWERT

(SPACE BELOW FOR FILING STAMP ONLY)

LEVY, KOSZDIN, GOLDSCHMID & SROLOFF
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
SUITE 1020
3550 WILSHIRE BOULEVARD
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(213) 380-3140

Attorneys for Defendants

FILED
MAY 27 1977
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CLIFFORD E. CLAYTON, Plaintiff, -vs- ITT GILFILLAN, A Division of International Telephone and Telegraph Corporation, a corporation; INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, an unincorporated labor organization; UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL UNION NO. 509, an unincorporated labor organization, Defendants.	CIVIL NO. 76-0730-IH FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on for trial on May 3, 4, and 5, 1977, the Court, having considered the testimony, exhibits, and oral argument, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Plaintiff, CLIFFORD E. CLAYTON was, prior to his discharge in February, 1975 an employee of Defendant ITT GILFILLAN

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and a member of Defendant INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, (hereafter referred to as "International Union"), and UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL UNION NO. 509 (hereafter referred to as "Local 509").

2. Defendants ITT Gilfillan, International Union, and Local 509 were signatory to a collective bargaining agreement which governed the terms and conditions of Plaintiff's employment at ITT Gilfillan and said collective bargaining agreement was in full force and effect during the period from March 1, 1973 through February 29, 1976.

3. Plaintiff was a member in good standing of Local 509 and the International Union at all times material hereto.

4. In February, 1975, Plaintiff was discharged by Defendant ITT Gilfillan for violation of Company Rule 5 which prohibits lewd, indecent and immoral behavior on said Defendant's premises.

5. In response to said discharge, Plaintiff timely filed a grievance in accordance with the grievance procedure contained in the collective bargaining agreement.

6. After processing the grievance through Step III of the grievance procedure, Ralph Gazzigli, ~~acting in his capacity as~~ the INTERNATIONAL Representative ~~of the International Union~~ servicing Defendant Local 509, IN HIS CAPACITY AS REPRESENTATIVE OF LOCAL 509, timely requested arbitration of Plaintiff's grievance. Subsequently, Mr. Gazzigli decided, ~~with the advice and consent of the officers of Local 509 and the International Union,~~ that the request for arbitration should be withdrawn. Plaintiff was notified of this decision by REPRESENTING A CITY OF a letter dated July 11, 1975 (Pl. Ex. 3)

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7. Articles 32 and 33 of the Constitution of the International Union provide internal union remedies for members of the International Union who are aggrieved by actions of a local union or the international union or any representatives thereof. The procedures provided by Articles 32 and 33 of the International Constitution are incorporated into Article VI of the By-Laws of Defendant Local 509. It was stipulated at trial that Plaintiff failed to initiate, let alone exhaust the internal union remedies provided in the International Constitution and the By-Laws of Local 509. More specifically, Plaintiff failed to take the following steps:

(a) Plaintiff failed to appeal the refusal to arbitrate his case to the membership of Local 509 as required by Article 33, Section 3 of the Constitution of the International Union.

(b) Plaintiff failed to appeal to the Public Review Board and/or International Executive Board as provided by Articles 32 and 33 of the Constitution of the International Union and by Article VI of the By-Laws of Defendant Local 509.

8. All the procedures mentioned in finding No. 7, supra, were available to Plaintiff. The Constitution of the International Union reasonably advised Plaintiff about his intra-union appeal rights. Moreover, Plaintiff was specifically advised about his intra-union rights by Bob Laster, President of Local 509. Mr. Laster specifically advised Plaintiff about Articles 32 and 33 of the International Constitution and about the rights of appeal to the Public Review Board.

///

9. In addition, the International Union mailed Plaintiff copies of Solidarity, the official newspaper of the International Union, which advised Plaintiff and other members of the availability of the intra-union remedies. The Articles from Solidarity included a solicitation for members to telephone the Public Review Board if they had any questions about its operations or how to initiate the procedures of the Public Review Board. The address to which the copies of Solidarity were sent since August, 1974 was Plaintiff's correct address. Upon occasion, Plaintiff read Articles from Solidarity, but, at other times, he did not bother to read the copies of Solidarity which he received.

10. Plaintiff had become familiar with the intra-union appeal procedures because he had previously seen and participated in an appeal made to the Local 509 Membership by one of its members.

11. Plaintiff was uniquely sensitive to his legal rights and pursued them in numerous ways, including the following:

(a) Plaintiff filed a charge with the National Labor Relations Board with respect to his discharge.

(b) Plaintiff also filed charges with the Equal Employment Opportunity Commission and the Fair Employment Practices Commission of the State of California with respect to his discharge.

(c) Plaintiff filed a claim for unemployment benefits with the State of California. When his claim for benefits were initially denied, Plaintiff requested a hearing and ultimately prevailed in said hearing. The hearings regarding Plaintiff's unemployment benefits occurred in the months of July and August, 1975.

///

12. Plaintiff was represented by counsel during his unemployment benefit hearings. The unemployment hearings took place during the time within which Plaintiff was required by Articles 32 and 33 of the International Constitution to initiate the internal union appeal procedures. Plaintiff sought advice from his counsel regarding his rights against Defendants. Plaintiff was advised by counsel to seek other counsel for further guidance in these matters.

13. At all times material hereto, the Public Review Board had the power to grant a range of possible relief, including the award of monetary damages, which would be appropriate and adequate in the instant case.

14. No evidence was presented at time of trial which indicated that the pursuit of the intra-union remedies by Plaintiff would have been futile for any reason. More specifically, no evidence was presented which indicated that there would have been a preordained negative result if Plaintiff had pursued the intra-union remedies.

15. All Findings of Fact set forth under the heading "Conclusions of Law" are hereby incorporated by reference herein.

CONCLUSIONS OF LAW

1. All Conclusions of Law appearing under the heading "Findings of Fact" are hereby incorporated by reference.

2. This Court has jurisdiction over the subject matter of the instant case pursuant to 28 U.S.C. §1337 and 29 U.S.C. §185 (a).

3. The exhaustion of internal union remedies is a prerequisite to the initiation of a lawsuit by a Union member who

feels aggrieved by the actions of his Union. Section 101(a)(4) of the Labor Management Reporting and Disclosure Act of 1959, (29 U.S.C. §411(a)(4)). Moreover, the Courts have enunciated the public policy that a union member may not sue his union if he has bypassed union remedies through which a union member may obtain an impartial examination of his dispute with the union. See, e.g., Buzzard vs. Local Lodge 1040, 480 F.2d 35 (9th. Cir. 1973)

4. Article 33 of the Constitution of the International Union embodies the above-mentioned public policy and imposes it on members of the International Union. The procedures contained in Article 33 of the Constitution are incorporated in the By-Laws of Local 509. Article 33, Section 12 of the International Constitution requires invocation of the internal union appeal procedures before a member resorts to a civil court or governmental agency for redress.

5. The intra-union remedies provided in Articles 32 and 33 of the Constitution of the International Union and the By-Laws of Local 509 provide an objective forum and tribunal for the redress of Plaintiff's grievance against the International Union and Local 509. Consequently, the intra-union remedies provided by the International Union and Local 509 are, as a matter of law, adequate. Newgent vs. Modine Mfg., 495 F.2d 919 (7th Cir. 1974); Brookins vs. Chrysler, 381 F. Supp. 563 (E.D. Mich. 1974); Jenkins vs. General Motors, 364 F. Supp. 302 (DC Del. 1973); 76 Harvard Law Review, 983 1035 (March, 1973).

6. The Public Review Board lacked the power to restore Plaintiff to his job. However, such power is not necessarily required for an adequate remedy. The powers of the Public Review

Board are functionally adequate within the requirements of the instant case.

7. Exhaustion of the intra-union remedies provided by the International Union and Local 509 would not have been futile for the Plaintiff because there was not a preordained negative result.[1]

8. Because Plaintiff has failed to initiate, let alone exhaust, the intra-union remedies provided by the International Union and Local 509, the parties have agreed and the Court finds that the issue of the Union's breach of its duty of fair representation and the issue of whether just cause existed for Plaintiff's discharge by the employer are both rendered moot and must be dismissed. Plaintiff's failure to exhaust the intra-union remedies bars him from proceeding further in this action. Buzzard vs. Local 1040, supra, Newgent vs. Modine Mfg. Co., supra. Accordingly, judgment must entered in favor of Defendants including the award of costs of suit.

---

[1] The above Findings and Conclusions are not affected by any concept of burden of proof. Assuming arguendo that Defendants have the burden of proof to show the Plaintiff's failure to exhaust intra-union remedies, the adequacy of those remedies and the lack of futility of exhausting such remedies, the Defendants have met such a burden by the preponderance of evidence.

DATED: MAY 27, 1977

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

LEVY, KOSZDIN, GOLDSCHMID & SROLOFF

By _____
MATTHEW B. F. BIREN
LAWRENCE ROSENZWEIG
Attorneys for Defendant Unions

PARKER, MILLIKEN, CLARK & O'HARA

By _____
EVERETT F. MEINERS
KENNETH J. FLORENCE
Attorneys for Defendant ITT Gilfillan

PROOF OF SERVICE

I am a citizen of the United States, over the age of 18 years, residing or employed in the County of Los Angeles, and not a party to the within action; my business address is:

3550 Wilshire Boulevard, Suite 1020, Los Angeles, CA. 90010

On May 13, 1977, I served a true copy of the attached.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

on the Plaintiff in said action, by hand delivering a true copy thereof enclosed in a sealed envelope addressed as follows:

John McTernan, Esq.
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Everett J. Meiners, Esq.
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333 South Hope Street
Los Angeles, California 90071

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on May 13, 1977 at Los Angeles, California.

Jay Tweed

JAY TWEED

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FFORD E. CLAYTON PLAINTIFF(S) VS GILFILLAN, et al DEFENDANT(S)	CASE NUMBER CV 76-0730-IH NOTICE OF ENTRY

TO THE ABOVE NAMED PARTIES AND TO THEIR ATTORNEY(S) OF RECORD:

You are hereby notified that JUDGMENT

_____ in the above entitled case was entered in the docket on MAY 31 1977.

You are also notified that if this case was tried and you introduced exhibits into evidence, they must be claimed at this office after the expiration of thirty days from the receipt of this notice. (After sixty days in cases in which the United States, its officers or agencies were parties) Unless they are claimed within thirty days after the expiration of the above period, they will be destroyed pursuant to Local Rule 20(a). If an appeal is taken they will, of course, be held until the Appellate Court finally determines the matter. Exhibits which are attached to a pleading will not be destroyed but will remain as a permanent record in the case file.

(over)

CERTIFICATE OF MAILING

I, Edward M. Kritzman, Clerk, United States District Court, Central District of California, and not a party to the within action, hereby certify that on MAY 31 1977, 19____, I served a true copy of this notice of entry on the parties in the within action by depositing true copies thereof, enclosed in sealed envelopes, in the United States Mail in the United States Post Office mail box at Los Angeles, California, addressed as follows:

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EDWARD M. KRITZMAN, CLERK

By Maru Zeledon
Deputy Clerk
MARU ZELEDON

NOTICE

IN ACTIONS ARISING UNDER THE ECONOMIC STABILIZATION ACT, THE EMERGENCY PETROLEUM ALLOCATION ACT, AND THE ENERGY POLICY AND CONSERVATION ACT, NOTICES OF APPEAL TAKEN FROM THIS JUDGMENT MUST BE FILED IN THE TEMPORARY EMERGENCY COURT OF APPEALS IN ACCORDANCE WITH THE RULES OF PROCEDURE OF THAT COURT.

Nos. 80-54 and 80-5049

IN THE

Supreme Court of the United States

October Term, 1980

ITT GILFILLAN, a Division of International Telephone and Telegraph Corporation, a corporation,

Petitioner,

vs.

CLIFFORD E. CLAYTON,

Respondent.

CLIFFORD E. CLAYTON,

Petitioner,

vs.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, and UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL NO. 509,

Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.

JOINT APPENDIX

(Names of Counsel on inside front cover)

Petitions for Certiorari Filed July 11 and 12, 1980.
Certiorari Granted November 3, 1980

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JOINT APPENDIX

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The following opinions, findings and order have been omitted in the printing of this appendix because they appear in the appendix to the Petition for Writ of Certiorari filed by ITT Gilfillan (80-54):

Findings of Fact and Conclusions of Law, Filed May 27, 1977.

Opinion, U.S. Court of Appeals for the Ninth Circuit, Filed September 4, 1979.

Order, U.S. Court of Appeals for the Ninth Circuit, Filed April 14, 1980.

Revised Opinion, U.S. Court of Appeals for the Ninth Circuit, Filed April 14, 1980.

Chronological List of Relevant Docket Entries

Date 5/3/76; Filed plaintiff's FIRST AMENDED COMPLAINT.

Date 5/11/76: Filed defendant ITT Gilfillan's ANSWER to first amended complaint.

Date 5/13/76: Filed plaintiff's AMENDMENT to first amended complaint.

Date 6/17/76: Filed defendants UAW International & UAW Local 509's ANSWER to First Amended Complaint.

Date: 2/6/76: Filed plaintiff's Pre-Trial Conference Order returnable, date not given.

Date 12/6/76: Minute Order: Pre-Trial Conference held. Court orders matter set for estimated 11 day Court Trial on 3/1/77, 9:30 a.m.

Date 5/3/77: Minute Order: Court Trial (1st day) swore in witnesses, marked exhibits, continued to 5/4/77, 9:45 a.m. for further trial.

Date 5/4/77: Minute Order: Court Trial (2nd day) Witness continued to testify, continued to 5/5/77, 10 a.m. for further trial.

Date: 5/5/77: Minute Order: Court Trial (3rd day) judgment by court, findings and conclusions of law and judgment to be prepared and lodged by 5/13/77, plaintiff objections to be filed by 5/19/77.

Date 5/27/77: Filed defendants' findings of fact & conclusions of law. Filed Judgment and Order that judgment shall be entered in favor of defendant United Automobile, Aerospace & Agricultural Implement Workers of America, UAW & its affiliated Local 509 & defendant ITT Gilfillan & defendants shall be awarded costs of suit. (Entered 5/31/77).

Date 6/27/77: Filed plaintiffs NOTICE OF APPEAL from Judgment entered on May 31, 1977.

First Amended Complaint for Injunction (Reinstatement) and Damages for Breach of Collective Agreement and for Breach of Duty of Fair Representation

United States District Court, Central District of California.

Clifford E. Clayton, Plaintiff, vs. ITT Gilfillan, a Division of International Telephone and Telegraph Corporation, a corporation, Defendant. Civil No. 76-0730-IH.

FILED: May 3, 1976.

AS AND FOR A FIRST CAUSE OF ACTION AGAINST DEFENDANT ITT GILFILLAN, A DIVISION OF INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, A CORPORATION, PLAINTIFF ALLEGES:

1. This action arises, and jurisdiction of the court is based upon, Section 301 of the Labor Management Relations Act, as amended, 20 USC §185.

2. Plaintiff, CLIFFORD E. CLAYTON, is a citizen and resident of Los Angeles County, State of California; and at all times material herein, plaintiff was a member in good standing of defendant INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, an unincorporated labor organization (hereinafter "International"), and of defendant UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL UNION NO. 509, and unincorporated labor organization (hereinafter "Local 509").

3. At all times material herein, defendants International and Local 509 were, and still are, unincorporated associations and labor unions, formed and existing for the purpose of collective bargaining and of representing the interests of their members, and doing business in the State of California, having a principal place of business in Los Angeles County, California.

4. At all times material herein, defendant ITT GILFILLAN, A division of International Telephone and Telegraph Corporation (hereinafter "ITT"), was a corporation duly organized and existing under the laws of a state of the United States, and authorized to do and doing business in the State of California, and having a principal place of business in Los Angeles County, California.

5. At all times material herein, defendant ITT and defendants International and Local 509, were parties to a written collective bargaining agreement, styled "Agreement between ITT Gilfillan, a Division of International Telephone and Telegraph Corporation and International Union United Automobile, Aerospace and Agricultural Implement Workers of America, Local Union No. 509, Los Angeles, California" effective from March 1, 1973 through February 29, 1976, and thereafter from year to year, hereinafter referred to as "Collective Agreement". A true copy of said Collective Agreement is attached to this complaint as Exhibit "A" hereto, and incorporated herein by reference. At all times material herein, said Collective Agreement governed the terms and conditions of employment by defendant ITT of plaintiff and of other members of International and Local No. 509.

6. From 1967 until he was wrongfully terminated on or about February 14, 1975, plaintiff was employed by defendant ITT at its facility located at 7821 Orion Avenue, Van Nuys, County of Los Angeles, California.

7. On or about February 14, 1975, defendant ITT summarily terminated plaintiff's employment, without just cause, in violation of Article II of said Collective Agreement; and at all times since that date defendant has refused to reinstate plaintiff to his former position of employment.

8. As a direct and proximate result of said breach of said Collective Agreement by defendant ITT, plaintiff has been damaged by loss of his employment by said defendant, and

has been damaged in a sum which he would have earned from such employment had defendant ITT not wrongfully terminated plaintiff; and has been damaged by reason of losing seniority, fringe benefits, and other benefits to which he was entitled under said Collective Agreement. The exact amount of damages suffered by plaintiff cannot yet be ascertained, and plaintiff prays leave of court to amend this complaint to set forth said sum when the same shall have been ascertained.

9. As a direct and proximate result of said breach of said Collective Agreement by defendant ITT, as herein alleged, plaintiff has suffered great physical hardship and has sustained severe and continuous emotional distress, to his general damage in the sum of $25,000.00.

10. The wrongful termination of plaintiff's employment by defendant ITT, as herein alleged, was malicious and was designed to injure plaintiff, and to intimidate and coerce other employees of defendant so as to cause them to forego rights guaranteed them by said Collective Agreement. By reason of defendant ITT's malicious conduct, and because this action is brought to preserve and extend the rights of all employees of defendants, plaintiff is entitled to an award of reasonable attorney's fees and litigation costs and to exemplary or punitive damages in the sum of $10,000.00.

11. Plaintiff has exhausted all internal remedies provided for in said Collective Agreement, prior to bringing this action; and any further exhaustion of such internal remedies with respect to the termination of his employment has been waived by defendants, or would be futile.

12. Plaintiff has no plain, speedy or adequate remedy at law for the wrongs alleged herein.

AS AND FOR A SECOND, SEPARATE AND DISTINCT CAUSE OF ACTION AGAINST INTER-

NATIONAL AND LOCAL 509, AND EACH OF THEM, PLAINTIFF ALLEGES:

13. Plaintiff incorporates herein by reference as if fully set forth in haec verba each and every allegation of paragraphs 1, 2, 3, 4, 5, 6 and 7 of the First Cause of Action herein.

14. At all times material herein, defendants International and Local No. 509 owed a duty of fair representation to all members of said defendant Unions, including plaintiff, i.e., the duty to represent plaintiff and all other members of said defendant Unions in the administration of said Collective Agreement without arbitrary discrimination — as the statutory exclusive Collective Bargaining Representative of such members.

15. At all times material herein, since February 14, 1975, said defendant Unions have breached their duty of fair representation to plaintiff by discriminatorily failing and refusing to protest and grieve plaintiff's wrongful termination by defendant ITT. Said defendant Unions failed and refused, upon plaintiff's request, to prosecute any protest or grievance against said defendant employer concerning said wrongful termination of plaintiff's employment; had such a protest or grievance been prosecuted by said defendant Unions in plaintiff's behalf, plaintiff would have obtained reinstatement and been otherwise made whole for his damages and losses; said defendant Unions acted arbitrarily, invidiously and discriminatorily in regard to plaintiff.

16. Plaintiff is excused from any requirement that he exhaust intra-union remedies as a condition precedent to the bringing of this lawsuit for the reason that the Union Constitution (a true copy of which is attached hereto marked Exhibit "B" and by this reference made part hereof) does not expressly provide a procedure available to plaintiff reasonably calculated to redress the particular grievance he complains of. (See Articles 32 and 33, Exhibit "B", page 58 line 60 to page 60 line 24.) No such intra-union remedy

was clearly called to plaintiff's attention by any union official.

17. Any attempt by plaintiff to exhaust intra-union remedies would have been futile by reason of the following facts: Plaintiff was terminated on February 14, 1975, and immediately filed written grievances in accordance with the provisions of Article VIII of the Collective Bargaining Contract (Exhibit "A", pages 9 to 10). The grievance was processed by the Shop Committee through Step 3 of the Grievance Procedure (Exhibit "A", pages 10-11). The Shop Committee then requested the Union to take the grievance to arbitration. (Article IX, Collective Agreement, Exhibit "A", pp. 13-14.) The Union must give the Company written notice of desire to submit a grievance to arbitration within fifteen (15) working days after the Company's decision at Step 3. (Article IX, Section 2, Exhibit "A", p. 13.) Plaintiff repeatedly, but without success, attempt to find out what was being done by the Union about the arbitration. Plaintiff's first information that the Union had determined not to take the matter to arbitration came when plaintiff received a copy of the letter of July 11, 1975, sent by Ralph Gazzigli, International Representative of defendant International to the National Labor Relations Board, a true copy of that letter as received by plaintiff is attached hereto as Exhibit "C" and by this reference made part hereof. This was approximately five months after the date of plaintiff's termination, and more than fifteen working days after the date of the Company's decision at Step 3 of the Grievance Procedure. Even if plaintiff had succeeded, through intra-union appeals procedures, in reversing Mr. Gazzigli's determination not to take his grievance to arbitration, the request for arbitration would have been rejected by the Company as untimely, and plaintiff could not obtain reinstatement and back pay.

18. As a direct and proximate result of the breach by defendants International and Local No. 509, of their duty

of fair representation to plaintiff, as herein alleged, plaintiff has been damaged by loss of his employment by said defendant ITT, and has been damaged in a sum which he would have earned from such employment had said defendant ITT not wrongfully terminated plaintiff, and has been damaged by reason of losing seniority, fringe benefits and other benefits to which he was entitled under said Collective Agreement. The exact amount of damages suffered by plaintiff cannot now be ascertained, and plaintiff prays leave of court to amend this complaint to set forth said sums when the same shall have been ascertained.

19. As a direct and proximate result of the breach by defendants International and Local No. 509, of their duty of fair representation to plaintiff, as herein alleged, plaintiff has suffered grave physical hardship and has sustained severe and continuous emotional distress, to his general damage in the sum of $25,000.00.

20. The breach by defendants International and Local No. 509 of their duty of fair representation to plaintiff as herein alleged, was malicious and was designed to injure plaintiff and to create hardship for him, and to intimidate and coerce other members of said defendant Unions so as to cause them to forego rights guaranteed them by said Collective Agreement. By reason of the malicious conduct of defendants International and Local No. 509, and each of them, and because this action is brought to preserve and extend the rights of all members of said defendant Unions, plaintiff is entitled to an award of exemplary damages.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. Injunctive relief compelling defendant ITT to reinstate plaintiff to his former (or substantially equivalent) position of employment, with all seniority and benefits to

which plaintiff would have been entitled had he not been wrongfully terminated;

2. Special damages for plaintiff in such sums as may be pleaded and proven;

3. General damages in the sum of $25,000.00;

4. Exemplary or punitive damages in the sum of $10,000.00;

5. Costs of suit herein; and

6. For such other and further relief as the court deems just.

MARGOLIS, McTERNAN, SCOPE & SACKS

By /s/ Elizabeth B. Spector
ELIZABETH B. SPECTOR
Attorneys for Plaintiff

(Exhibits A, B and C have been omitted. They appear printed elsewhere in this appendix.)

(Certificate of Proof of Service omitted in printing.)

Answer of ITT Gilfillan to First Amended Complaint for Injunction (Reinstatement) and Damages for Breach of Collective Agreement and for Breach of Duty of Fair Representation

United States District Court, Central District of California.

Clifford E. Clayton, Plaintiff, v. ITT Gilfillan, a Division of International Telephone and Telegraph Corporation, a corporation, et al., Defendants. CIVIL NO. 76-0730-IH.

FILED: May 11, 1976

DEFENDANT ITT GILFILLAN, a Division of International Telephone and Telegraph Corporation (hereinafter referred to as "ITT GILFILLAN"), and for no other defendant, answers the First Amended Complaint of Plaintiff, CLIFFORD E. CLAYTON, as follows:

1. At all times mentioned herein defendant ITT GILFILLAN was a division of International Telephone and Telegraph Corporation, a corporation duly organized and existing under the laws of the State of Delaware, with a place of business located in Van Nuys, California.

2. Answering Paragraph 2, defendant ITT GILFILLAN is without knowledge or information sufficient to form a belief as to the truth of said Paragraph.

3. Answering Paragraph 6, defendant ITT GILFILLAN denies that plaintiff was wrongfully terminated.

4. Answering Paragraph 7, defendant ITT GILFILLAN admits that on or about February 14, 1975, it terminated plaintiff's employment. Defendant ITT GILFILLAN specifically denies that it terminated plaintiff in violation of its collective bargaining agreement with the International Union of United Automobile, Aerospace and Agricultural

Implement Workers of America ("UAW"), and Local Union No. 509 of the UAW.

5. Answering Paragraph 8, defendant ITT GILFILLAN denies that plaintiff has been damaged in any manner by the direct or proximate result of any breach of the aforesaid collective bargaining agreement.

6. Answering Paragraph 9, defendant ITT GILFILLAN denies that plaintiff has suffered great physical hardship and severe emotional distress as the result of any acts of said defendant and specifically denies that it should be assessed the sum of $25,000 or any amount at all as damages.

7. Answering Paragraph 10, defendant ITT GILFILLAN denies that any of its actions were malicious or designed to injure plaintiff or to intimidate or coerce other employees in order to cause them to forego rights guaranteed under the aforesaid collective bargaining agreement. Defendant ITT GILFILLAN specifically denies that plaintiff is entitled to attorneys' fees, litigation costs, or exemplary or punitive damages in the sum of $10,000 or in any sum at all.

8. Answering Paragraph 11, defendant ITT GILFILLAN denies each and every allegation contained and set forth in said paragraph.

9. Answering Paragraph 12, defendant ITT GILFILLAN denies that plaintiff has no plain, speedy or adequate remedy at law for any cause of action stated in the First Amended Complaint herein.

FIRST AFFIRMATIVE DEFENSE

10. The First Amended Complaint herein does not state sufficient facts to constitute a claim for relief against this answering defendant.

SECOND AFFIRMATIVE DEFENSE

11. Any cause of action which plaintiff may have constitutes an unfair labor practice under the Labor Management Relations Act (28 U.S.C. § 141 *et seq.*), and this Court is preempted from jurisdiction.

THIRD AFFIRMATIVE DEFENSE

12. The First Amended Complaint herein does not state any facts upon which a claim of relief for punitive damages may be maintained against defendant ITT GILFILLAN.

FOURTH AFFIRMATIVE DEFENSE

13. The First Amended Complaint herein does not state any facts upon which a claim of relief for attorneys' fees may be maintained against defendant ITT GILFILLAN.

FIFTH AFFIRMATIVE DEFENSE

14. The First Amended Complaint herein does not state any facts upon which a claim of relief for damages for emotional distress may be maintained against defendant ITT GILFILLAN.

SIXTH AFFIRMATIVE DEFENSE

15. Upon information and belief defendant ITT GILFILLAN alleges that plaintiff has failed to exhaust the internal remedies provided for by defendant UAW and defendant Local Union 509. As a result of these facts, plaintiff has failed to state any claim upon which relief can be granted against defendant ITT GILFILLAN.

WHEREFORE, defendant ITT GILFILLAN prays that the plaintiff take nothing by reason of his First Amended

Complaint herein and that said defendant be awarded its costs of suit incurred herein and such other and further relief as this Court deems just and proper.

DATED: May 7, 1976.

PARKER, MILLIKEN, KOHLMEIER,
CLARK & O'HARA
EVERETT F. MEINERS
KENNETH J. FLORENCE

/s/ By Kenneth J. Florence
Kenneth J. Florence
Attorneys for Defendant
ITT GILFILLAN

(Certificate of Proof of Service omitted in printing.)

Stipulation for Amendment to First Amended Complaint and Order

United States District Court, Central District of California.

Clifford E. Clayton, Plaintiff, vs. ITT Gilfillan, a Division of International Telephone and Telegraph Corporation, a corporation; International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, an unincorporated labor organization; United Automobile, Aerospace and Agricultural Implement Workers of America, Local Union No. 509, an unincorporated labor organization. Defendants. Civil No. 76-0730 - IH.

FILED: May 13, 1976.

IT IS HEREBY STIPULATED AND AGREED by and among the parties hereto, through their respective undersigned counsel, that plaintiff's First Amended Complaint may be amended to correct a typographical error in the caption thereof. The caption will be amended to read:

> "CLIFFORD E. CLAYTON, Plaintiff, vs. ITT GILFILLAN, a Division of International Telephone and Telegraph Corporation, a corporation; INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, an unincorporated labor organization; UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT

WORKERS OF AMERICA, LOCAL UNION No. 509, an unincorporated labor organization. Defendants."

Dated at Los Angeles, California This 11th day of May, 1976

MARGOLIS, McTERNAN, SCOPE & SACKS
/s/ By Elizabeth B. Spector
Elizabeth B. Spector
Attorneys for Plaintiff

May 11, 1976

PARKER, MILLIKEN, KOHLMEIER, CLARK & O'HARA
/s/ By Kenneth J. Florence
Kenneth J. Florence
Attorneys for Defendant ITT Gilfillan

This 10th day of May, 1976

LEVY, KOSZDIN & WOODS,
A Professional Corporation
/s/ By Matthew B. F. Biren
Matthew B. F. Biren
Attorneys for Defendants UAW International Union and UAW Local 509

This .... day of May, 1976.

ORDER

Pursuant to the above Stipulation, and good cause therefor appearing, IT IS HEREBY ORDERED that plaintiff's First Amended Complaint may be amended in the respects recited in said Stipulation.

Dated: May 13, 1976.

/s/ Irving Hill
Judge of the United States
District Court

Answer to First Amended Complaint

United States District Court, Central District of California.

Clifford E. Clayton, Plaintiff, vs. ITT Gilfillan, a Division of International Telephone and Telegraph Corporation, a Corporation, et al., Defendants. Civil No. 76-0730-IH.

FILED: June 17, 1976

Defendants, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and United Automobile, Aerospace and Agricultural Implement Workers of America, Local Union No. 509 (hereinafter collectively referred to "Union"), severing themselves from all other defendants, answer the First Amended Complaint as follows:

1. The Union admits paragraphs 1 through 5.

2. The Union admits that Plaintiff was employed by Defendant ITT from 1967 until terminated February 14, 1975; the Union specifically denies, however, that the Plaintiff was wrongfully terminated.

3. The Union admits that the Plaintiff has not been reinstated subsequent to his termination from ITT; except as specifically admitted, the Union denies generally and specifically, each and every allegation set forth in paragraph 7.

4. With respect to the allegation set forth in paragraph 8, the Union denies that Defendant ITT breached the terms of the collective bargaining agreement. Accordingly, the Union denies, generally and specifically, each and every allegation set forth in paragraph 8 of the Complaint and specifically denies that Plaintiff has been damaged in any amounts as a result of actions taken by Defendant ITT pertaining to the termination of Plaintiff.

5. The Union denies, generally and specifically, each and every allegation set forth in paragraph 9 of the Complaint and specifically denies that Plaintiff has been damaged to any extent as a result of the actions taken by Defendant ITT in terminating the employment of Plaintiff.

6. With respect to the allegations set forth in paragraph 10 of the Complaint, the Union denies, generally and specifically, each and every allegation set forth therein and specifically denies that Plaintiff is entitled to exemplary or punitive damages in any sum, whatsoever.

7. The Union denies, generally and specifically, each and every allegation set forth in paragraphs 11 and 12 of the First Amended Complaint.

8. With respect to the allegation set forth in paragraph 13 of the Complaint, the Union incorporates by reference, as though set forth in their entirety, the responses set forth with respect to the corresponding paragraphs of the First Cause of Action incorporated through paragraph 13 into the Second Cause of Action.

9. The Union admits the allegation set forth in paragraph 14 of the First Amended Complaint.

10. The Union denies, generally and specifically, each and every allegation set forth in paragraphs 15 through 18 of the First Amended Complaint.

11. The Union denies, generally and specifically, each and every allegation contained in paragraph 19 of the Complaint and specifically denies that Plaintiff is entitled to recovery of any sum, whatsoever as a result of the conduct of the Union.

12. The Union denies, generally and specifically, each and every allegation set forth in paragraph 20 of the Complaint and specifically denies that Plaintiff is

entitled to an award of exemplary damages in any sum, whatsoever.

FIRST AFFIRMATIVE DEFENSE

13. The First Cause of Action to the First Amended Complaint does not state a claim against the Union upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

14. The Second Cause of Action to the First Amended Complaint does not state a claim against the Union upon which relief can be granted.

THIRD AFFIRMATIVE DEFENSE

15. The Plaintiff has failed to exhaust his intra-union administrative grievance procedures and is therefore barred from pursuing this action.

FOURTH AFFIRMATIVE DEFENSE

16. Complaint, in its entirety, is barred by the applicable statute of limitations.

FIFTH AFFIRMATIVE DEFENSE

17. The First Amended Complaint, in its entirety, does not state any facts upon which a claim of relief for punitive damages may be maintained against the Union.

SIXTH AFFIRMATIVE DEFENSE

18. The First Amended Complaint, in its entirety, does not state any facts upon which a claim of relief of attorney's fees may be maintained against the Union.

SEVENTH AFFIRMATIVE DEFENSE

19. The First Amended Complaint, in its entirety, does not state any facts upon which a claim of relief for damages for emotional distress may be maintained against the Union.

Wherefore, the Union prays that the Plaintiff take nothing by reason of his First Amended Complaint herein and that

said Defendants be awarded its costs of suit incurred herein and such other further relief as the Court deems just and appropriate.

DATED: June 16, 1976.

LEVY, KOSZDIN & WOODS
A Professional Corporation
/s/ By Matthew B. F. Biren
MATTHEW B. F. BIREN
Attorneys for Defendants UAW International and Local 509

(Certificate of Proof of Service omitted in printing.)

Pre Trial Conference Order

United States District Court, Central District of California.

Clifford E. Clayton, Plaintiff, vs. ITT Gilfillan, etc., et al., Defendants. No. Civil 76-0730-IH.

Filed: Dec. 6, 1976.

Following Pre Trial proceedings, pursuant to the special requirements of the Court, IT IS ORDERED:

I. *This is an action for*:

Injunction and damages for breach of collective agreement and for breach of duty of fair representation. The parties are:

Clifford E. Clayton, Plaintiff.

ITT Gilfillan, a Division of International Telephone and Telegraph Corporation, a corporation, Defendant.

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, an unincorporated labor organization, Defendant.

United Automobile, Aerospace and Agricultural Implement Workers of America, Local Union No. 509, an unincorporated labor organization, Defendant.

The pleadings which raise the issues are:

First Amended Complaint and Amendment to First Amended Complaint:

Answer of ITT Gilfillan, to First Amended Complaint;

Answer to First Amended Complaint by defendants UAW International and UAW, Local 509.

II. *Federal jurisdiction and venue are invoked upon the ground*:

The action is a civil action of which this Court has original jurisdiction under 28 USC §1337 and 29 U.S.C. §185(a). Defendant ITT Gilfillan is a corporation, doing business within the Central District of California. Defendant UAW International has a principal place of business within the Central District of California. Defendant UAW Local 59 is located within said Central District. Venue is properly laid in the Central District. Federal jurisdiction is admitted by all parties.

III. *The trial is estimated to take a total of 11 days, as follows*:

Defendants estimate that the trial on the issue of exhaustion will take two days; the trial on the issue of fair representation will take four days; the trial on the issue of discharge will take five days.

IV. The parties agree that the issue of exhaustion of internal remedies may be separated from the remaining issues and tried before the court without a jury. Should this issue be determined favorably to plaintiff, defendants reserve the right to move the Court for a further separation of the representation issue from the issue of the merits of the discharge. If the trial is so further bifurcated, the issue of the Unions breach of duty of fair representation will be tried before the Court without a jury. Defendants further reserve the right to argue that jury trial is not appropriate with respect to the issues of termination and just cause therefor.

Should any portion of this action be tried before a jury, at least one week prior to the date such jury trial is to begin, each counsel will deliver to the Court and opposing counsel:

(1) Proposed jury instructions, and

(2) Any special questions requested to be put to prospective jurors on voir dire.

V. *The following facts are admitted and require no proof*:

(a) At all times material herein plaintiff Clifford Clayton was a member of defendant Unions-

(b) Clifford Clayton was an employee of ITT Gilfillan.

(c) At all times herein material, there was a Collective Bargaining Agreement in existence between defendant ITT Gilfillan and defendant Unions; plaintiff Clayton's employment was governed by the terms and conditions of said Collective Bargaining Agreement.

(d) At all times material defendant ITT Gilfillan had in effect employee Rules and Regulations specifying that violations for which the employee may be suspended with a recommendation for discharge pending results of an investigation include . . .

4. Immoral or indecent conduct.

(e) At all times relevant herein, plaintiff Clayton was a Union Steward.

(f) Plaintiff Clayton was suspended from his employment pending an investigation, on February 7, 1975 and was terminated by defendant ITT Gilfillan on February 14, 1975.

(g) Clayton timely filed grievances in accordance with the Grievance and Arbitration procedure of the Collective Bargaining Contract between defendant Unions and ITT Gilfillan, protesting his suspension and termination.

(h) Said grievances were processed by defendant Union through the first Three Steps of the contractual grievance procedure and remained unresolved.

(i) A timely request for arbitration was filed by defendant Unions.

(j) The defendant Unions withdrew the request to arbitrate on July 11, 1975.

(k) Plaintiff Clayton did not initiate the appeals procedures provided for in Articles XXXII and XXXIII of the UAW Constitution.

(l) Plaintiff Clayton did not seek medical attention for alleged emotional distress.

VI. *The following facts though not admitted are not to be contested at the trial by evidence to the contrary.*

NONE

VII. *The following mixed issues of fact and law, and no others, remain to be litigated at the trial.*

(a) In refusing to arbitrate plaintiff's grievance, did the defendant Unions:

(1) Act arbitrarily?

(2) Act discriminatorily?

(3) Act capriciously?

(b) Was the Union negligent in its handling of plaintiff's grievance.

(c) In its refusal to arbitrate plaintiff's grievance was the Union's conduct:

(1) Outrageous.

(2) Malicious.

(d) Was it futile for plaintiff to attempt to exhaust Union internal remedies.

(e) Did the Union internal appeals procedure provide adequate remedies for plaintiff.

(f) Is plaintiff barred from pursuing this litigation because of his failure to exhaust internal Union remedies.

(g) Was there just cause to support defendant ITT Gilfillan's discharge of plaintiff.

(h) Did plaintiff suffer emotional distress.

(i) Is plaintiff entitled to damages for emotional distress against:

(1) Defendant ITT Gilfillan.

(2) Defendant Union.

(j) Amount of damages suffered by plaintiff.

(k) Did plaintiff take adequate actions to mitigate damages.

(l) Measure of damages.

VIII. *The following issues of law and no others remain to be litigated at the trial:*

(a) Is plaintiff entitled to punitve damages:

(1) Against defendant ITT Gilfillan.

(2) Against defendant Unions.

(b) Is plaintiff entitled to recover attorneys' fees:

(1) Against defendant ITT Gilfillan.

(2) Against defendant Unions.

IX. *The exhibits to be offered at the trial are as follows:*

FOR PLAINTIFF:

1. Collective Bargaining Agreement between defendant ITT Gilfillan and defendant Unions in effect in February, 1975.

2. Constitution and By-Laws of defendant International.

3. Letter of Ralph Gazzigli to National Labor Relations Board, dated July 11, 1975.

4. Notes of investigation made by Lois Casey of events leading up to plaintiff's discharge.

5. Performance evaluations of plaintiff's work by defendant ITT Gilfillan.

6. Milligan's notes of investigation carried on by defendant ITT Gilfillan.

JOINT EXHIBITS FOR DEFENDANT ITT GILFILLAN AND DEFENDANT UNIONS.

A. Collective Bargaining Agreement between defendant ITT Gilfillan and defendant Unions in effect in February, 1975.

B. Constitution and By-Laws of defendant International.

C. Letter of Ralph Gazzigli to National Labor Relations Board, dated July 11, 1975.

D. Notes of investigation made by Lois Casey of events leading up to plaintiff's discharge.

E. Copies of Solidarity, attached to defendant's Union's Motion for Summary Judgment.

F. Copies of Public Review Board Opinions, attached to defendant's Union's Motion for Summary Judgment.

G. Summary of prior disciplinary action taken against plaintiff by defendant ITT.

H. Copies of the two grievances filed by plaintiff.

I. Defendant ITT Gilfillan's responses to those grievances.

All of the above exhibits may be admitted into evidence without objection, except the following which are objected to:

EXHIBIT NO.	NATURE OF OBJECTION
5	Lack of relevance.
6	Lack of relevance.
E	Lack of foundation; irrelevant.
F	Lack of foundation; irrelevant.
G	Irrelevant.

X. Discovery is not yet complete. The parties agree that discovery will be completed 30 days in advance of trial, unless special permission is obtained from the Court to conduct discovery during the 30 day period in advance of trial.

XI. *The following witnesses will be called to testify for plaintiff.*

Clifford Clayton, 1852 West 76th St., Los Angeles, CA. 90008

Lois Casey, 10945 Rosco Boulevard, Sun Valley, CA 91352.

Bertha Figueroa, 763 Chatsworth Drive, San Fernando, CA.

Hosie Payne, 4422 Pinafore Street, Apt. 1, Los Angeles, CA 90008

Plaintiff has not yet determined whether or not he will call any expert witnesses. It is agreed between the parties that plaintiff may add such experts to his list of witnesses provided that he furnishes the names of such experts and their field of expertise within 30 days prior to trial on the issue for which the experts will be called and will not object to defendants' deposing those witnesses within that 30 day period. Defendants will not object to plaintiff's deposing their expert witnesses within that same 30 days period.

Joint Witnesses For Defendant ITT Gilfillan and Defendant Unions.

On the issue of exhaustion of Union remedies, defendants will call the following witnesses:

Clifford Clayton, address above.

Ralph Gazzigli, 7802 Apperson Street, Sunland, CA.

Bob Lassiter, United Automobile Workers, Local 509.

David Klein, c/o Solidarity House, 5200 Jefferson Avenue, Detroit, Michigan.

Benjamin Aaron, School of Law, University of California at Los Angeles.

M. Jay Whitman, c/o Solidarity House, 5200 Jefferson Avenue, Detroit, Michigan.

On the issue of breach of duty of fair representation defendants will call the following witnesses:

Clifford Clayton, address above.

Bob Lassiter, address above.

Lois Casey, address above.

Jerry Whipple, 5150 E. Gage Street Bell, California.

Charles K. Hackler (expert witness).

Joseph Gentile (expert witness) 1801 Century Park East, Los Angeles, California 90067.

Adolph Koven, 304 Greenwich Street, San Francisco, California 94133 (expert witness).

Jack Milligan, ITT-Gilfillan.

On the issue of plaintiff's termination and just cause therefor, defendants will call the following witnesses:

Clifford Clayton, address above.

Ralph Gazzigli, address above.

Lois Casey, address above.

Hosie Payne, address above.

Don Carpenter, 7345 LaSaine Avenue, Van Nuys, CA., 91406.

Clason T. Jones, 36200 North Paradise Ranch Road, Castaic, Los Angeles, California

Jack Milligan, address above.

George Dumont, ITT Gilfillan.

XII. *The following Law and Motion matters are pending or contemplated.*

Plaintiff intends to move the Court for permission to amend his complaint to claim attorneys' fees against defendant Unions based upon Appellate decisions rendered after the decision in *Alyeska Pipeline Service Company v. Wilderness Society*, 420 U.S. 240, 44 L.Ed. 2d 141 (1975).

Defendants reserve the right to move the Court to separate further the issue of fair representation from the issue of the merits of plaintiff's discharge.

XIII. The foregoing admissions having been made by the parties, and the parties having specified the foregoing issues of fact and law remaining to be litigated, this order shall supplement the pleadings and govern the course of the trial of this cause, unless modified to prevent manifest injustice.

Dated: Dec. 6 1976

/s/ Irving Hill
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT.

MARGOLIS, McTERNAN, SCOPE & SACKS,
/s/ By Elizabeth B. Spector
Elizabeth B. Spector
Attorney for Plaintiff

LEVY, KOSZDIN & WOODS,
/s/ By Matthew B. F. Biren
Matthew B. F. Biren
Attorneys for defendant UAW, International Union and UAW Local 509

PARKER MILLIKEN, KOHLMEYER, CLARK & O'HARA,
/s/ By Everett F. Meiners
Everett F. Meiners
Attorneys for defendant ITT Gilfillan

Excerpts from Joint Trial Exhibit A
— Collective Bargaining Agreement —

AGREEMENT
between
ITT GILFILLAN
a Division of
INTERNATIONAL TELEPHONE AND
TELEGRAPH CORPORATION
and
INTERNATIONAL UNION
UNITED AUTOMOBILE,
AEROSPACE
AND AGRICULTURAL
IMPLEMENT WORKERS
OF AMERICA
LOCAL UNION NO. 509
LOS ANGELES, CALIFORNIA
1973-1976

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* * *

ARTICLE II
MANAGEMENT RIGHTS

The management of the Company and the direction of the working force are vested exclusively in the Company and shall not in any way be abridged except as specific restrictions are set forth in this Agreement.

The Company hereby retains the sole control over all matters concerning the operations, management and administration of its business; the determination of the location and relocation of its plants; the determination of the products to be manufactured or the services to be rendered; the determination as to whether components, piece parts or complete manufactured units or services shall be made or purchased; the direction, instruction and control of employees including, but not limited to, the determination of the qualifications of employees to perform work, the determination of quality standards, the assignment of work or overtime, the right to select, hire, lay off, reclassify, promote, transfer, or retire, to discipline, suspend or discharge for just cause, the right to determine job content and to create new job classifications; the right to combine and, or eliminate job classifications and to establish new rates of pay therefore; the right to determine the hours of work, the starting and quitting times, the processes, methods and procedures to be employed; and the right to make and enforce rules, and to perform all other functions inherent in the administration, management, control and or direction of business except as expressly limited by the terms of the Agreement.

* * *

ARTICLE VIII
GRIEVANCE PROCEDURE

Section 1.

The Company and the Union recognize the necessity for speedy and equitable adjustment of all grievances or disputes. Both parties pledge their best efforts and cooperation in a joint effort to make the grievance procedure function satisfactorily for all concerned.

It is the intention of both Company and Union to eliminate all unnecessary grievances and promptly and equitably adjust all those grievances which are meritorious. It is the intention of both Company and Union that the first step of the grievance procedure shall be handled insofar as possible and practicable between the aggrieved employee with or through his Shop Steward and the Foreman of the aggrieved employee.

Section 2.

(a) Any controversy or difference as to (1) interpretation or application of this agreement, or (2) any alleged violation of this agreement, shall be subject to the grievance procedure as set forth in this Article.

If a satisfactory adjustment of the dispute is not made between the Foreman and the employee or his Shop Steward, the following procedure shall be followed:

Step 1: The written grievance shall be signed by the employee and, or Shop Steward and presented to the employee's supervisor within five (5) working days from the inception or discovery of the incident which gave rise to the grievance. The supervisor shall give his answer and reasons for his decisions in writing for specific violations to the grievant through the Shop Steward within three (3) working days following receipt of the written grievance. The supervisor's answer shall not constitute the Company's defense in the subsequent steps of the grievance procedure.

Step 2: If the answer in Step 1 is not satisfactory, the Shop Committeeman will meet and present the grievance to the Director of Employee Relations or his designated representative within five (5) working days of receipt of the answer in Step 1. The Director of

Employee Relations or designated representative will render his decision in writing within five (5) working days of receipt of the grievance in Step 2.

Step 3: If the answer in Step 2 is not satisfactory, the Union may within three (3) working days after the answer at Step 2, request that the grievance be discussed at the next regular grievance committee meeting. The Director of Employee Relations, and, or such other representative of the Company as he shall designate, will meet on Wednesday at 2:00 o'clock with the grievance committee unless by mutual agreement another day is selected. Witnesses will not be called to a third step meeting without mutual agreement.

(b) Unresolved grievances and any other dispute shall be referred to the Director of Employee Relations or his delegate and the International Representative or a local union representative (or their delegates). Any such unresolved dispute or grievances shall be submitted on an agenda basis to be discussed following the conclusion of third step grievance meetings. By mutual agreement grievances may be referred back to a previous step in the grievance procedure.

Section 3.

It is agreed that a local 509 representative or the Shop Committeeman shall have the right to file a grievance at Step 3, provided that any such grievance is filed within six (6) working days of the happening of the event which gave rise to the grievance, and all reasonable attempts have been made to process the grievance in the first and second step.

Section 4.

Any employee who desires to consult with a Shop Steward or Shop Committeeman with respect to a grievance shall

advise his supervisor prior to any such meeting. Any Shop Steward or Shop Committeeman who finds it necessary to investigate a grievance shall notify his supervisor. Subject to reasonable delay for production reasons, the supervisor shall make the necessary arrangements for any such meeting or investigation.

Section 5.

The time limits contained herein may be extended by mutual agreement in writing by the parties concerned.

Section 6.

In the event an employee is to be suspended or discharged from employment, the following procedure will apply:

The employee will be notified of the action to be taken in the presence of his Shop Committeeman and/or Shop Steward, in the absence of the Shop Committeeman. In the event the regular Shop Steward or Shop Committeeman is not present at the plant, the management shall advise the employee of his right under the Agreement and shall advise the Chairman of the Committee. The regular Shop Steward and/or Shop Committeeman shall be advised of the action as soon as possible. An employee who is discharged or his Shop Steward or Shop Committeeman may process his grievance to Step 2 of the Grievance Procedure, provided he does so within three (3) working days of his last hour worked, or in the case of an absent employee, within three (3) working days of notification of discharge. The Company will notify the Union at the time a Bargaining Unit employee is discharged.

Section 7.

The Company recognizes its responsibility to process grievances in a timely manner, however, any grievance not answered by the Company in the proper time limit shall be

automatically moved to the next step, as though the answer had been negative.

Section 8.

In the case of a grievance involving the loss of time or money, the Company shall not be required, under any circumstances, to make payments for any period of time in excess of thirty (30) working days prior to the date the grievance was originally submitted in writing in the Grievance Procedure.

Any back pay awarded shall be mitigated by other competition received by an employee from any source while he was in a suspended, discharged, laid off, or other inactive Company status. The intent of this clause is to make the employee "whole". This clause shall also apply in arbitration cases.

ARTICLE IX
ARBITRATION

Section 1.

Only grievances or disputes as to (1) interpretation or application of an express provision of this Agreement, or (2) any violation of an express provision of this Agreement which have not been settled satisfactorily at Step 3, may be arbitrated as provided in this Article.

Section 2.

If the Union desires to submit a grievance or dispute, as defined in Section 1 of this Article, to arbitration, notice shall be given to the Company in writing within fifteen (15) working days after the date of the Company's decision at Step 3 of the Grievance Procedure. The parties shall within five (5) working days thereafter agree on the selection of an arbitrator. In the event the parties cannot agree on the

selection of an arbitrator within this five (5) day period, the arbitrator shall be chosen as follows:

The Union will request, in writing with a copy to the Company, the Federal Mediation and Conciliation Service, to submit a list of five arbitrators. Each party shall alternately strike one (1) name from the list, and the remaining individual shall be the arbitrator. The party striking the first name shall be decided by lot. In the event that the selected arbitrator is not able to conduct the hearing, the parties will mutually agree upon a substitute or use the procedure of this Section as necessary.

Section 3.

The authority of the arbitrator shall be limited to the interpretation or application of the existing written terms of this Agreement, and all other matters are expressly excluded from arbitration. The arbitrator shall have no power to add to, subtract from, or modify the terms of this Agreement or any Agreement supplementary hereto.

Section 4.

The written decision of the Arbitrator shall be final and binding upon the parties hereto. Such decision shall be rendered in writing and shall be issued to the parties within thirty (30) days of the completion of the hearing. Two (2) copies of the finding and award will be mailed to the Company and one (1) each to the Union Local, Regional and International headquarters.

Section 5.

The expenses and compensation of the arbitrator shall be equally borne by the Company and the Union.

ARTICLE X
SENIORITY

Section 1. Seniority Defined

Seniority is defined as the length of an employee's continuous service with the Company. The continuous service

date shall mean the original date of hire, except that if an adjustment has been made, the "hire date" shall be his adjusted hire date. On the effective date of this Agreement, all seniority dates in effect immediately prior thereto shall continue in effect.

Section 2. Application of Seniority

For purposes of applying the seniority provisions pertaining to promotions and transfers, assignment to shifts, layoff and recall and temporary layoff, the Van Nuys Complex shall constitute the Seniority Unit.

Section 3. Job Families

Similar work is defined as job classifications that have been grouped into job families in a manner designed to insure that skills and abilities required within a given job family are similar to the extent that (a) a minimum amount of training time would be necessary to teach the employee the jobs immediately above or below his present classification, and (b) it is most likely that the employee would be capable of efficiently performing the jobs immediately above or below his present classification with the training mentioned above. Such job families are set forth in Section 1 to Appendix A.

Section 4. Promotions

In all cases of promotion of employees to jobs within the bargaining unit to a job related by job family to the job which they are presently doing, the following shall control:

(1) Seniority;

(2) Ability and capacity to perform the job. Where ability and capacity are relatively equal as between two employees, the employee having the greater seniority shall be given preference in the promotion.

Leadmen shall be promoted on the basis of qualifications with respect to performance, leadership and ability to instruct other employees. In any case where these qualifications are relatively equal, seniority shall be the deciding factor.

Section 5. Temporary Layoff

In the event a temporary reduction in the number of employees in a job classification is required, it is the intent of the Company to recognize seniority if possible. For purposes of this Article, a temporary reduction will not exceed three (3) working days and no senior employee shall be temporarily laid off more than six (6) days per year.

Section 6. Notice of Layoff

If possible, the Company shall give an employee scheduled to be laid off and his Steward at least two (2) working days notice in advance of such layoff.

Section 7. Preferential Seniority for Union Representatives

For purposes of reduction of work force or transfer, recognized Committeemen and Stewards shall be considered as having the longest term of service in their area of representation.

Section 8. Shift Transfers

If there is no prior written request from a senior employee in the classification to be transferred to another shift, the least senior employee in the classification will be moved to the other shift, in accordance with provisions of Article XXXVII, Section 1, provided he has demonstrated the skill and ability to perform the work of the employee whom he will replace. This section shall only apply to available openings withing the employee's job classification.

Section 9. Job Posting

When a vacancy occurs in any job classification which cannot be filled under the provisions of Section 4 of this Article, a notice will be posted on the Company Bulletin Boards and employees will be given two (2) working days in which to file a written application listing their qualifications for the job. Qualifications shall include past experience on work similar to the new job or vacancy, educational training, and experience as an employee at ITT Gilfillan, as well as seniority. At the close of the application period, the vacancy shall be filled from among qualified applicants. Seniority will be the determining factor, provided the senior employee is qualified to perform the vacant job in a satisfactory manner. Employees refused job bid will be notified of reasons for refusal in writing.

In the event there are no qualified applicants for the job, the Company may offer the vacancy to qualified non-applicants or fill the vacancy by hiring.

If it is demonstrated at any time within thirty (30) calendar days that the employee is not qualified in the classification into which he was placed as a result of bidding, he shall be returned to his former job classification and rate and shall have no bid rights for any other classification for three (3) months or that classification for a six (6) month period. These time limits may be waived by mutual agreement.

If an employee terminates or fails to qualify during his trial period on the job, the Company will fill the opening from among the original qualified applicants in the same manner stated above and will not post the job again.

Upgraded employees who qualify for the job at the end of thirty (30) days shall receive their former rate of pay or the rate provided for in Step 1 of the new classification, whichever is higher, and shall have no bid rights for six (6) months which may be waived by mutual agreement.

Section 10. Terminating Seniority

Seniority shall be broken and terminated for the following reasons:

(a) Resignations:

(b) Discharge for cause;

(c) Layoff or absence from the payroll for any reason other than industrial accident, military or union leave for a greater length of time than two (2) years for employees with less than five (5) years of service and three (3) years for employees with more than five (5) years of service.

(d) Failure to return to work at the end of his vacation period or at the end of an approved leave of absence unless prevented by conditions beyond his control.

(e) Failure to accept a recall to the highest classification to which he has recall rights within five (5) working days after notice of recall. If recalled to another classification in his job family, he may decline such recall and sign a waiver indicating he had an opportunity for recall. He shall then continue on layoff until another recall opportunity is available.

(f) Failure to notify the Company within three (3) consecutive days of absence unless prevented by conditions beyond control of the employee.

(g) Retirement

Within five (5) working days from the end of each calendar month the Company will provide the Union a list of employees who are terminated in accordance with paragraphs (c), (d), (e) and (f) above.

Section 11. Temporary Transfers

(a) Transfers for a period of up to thirty (30) calendar days will be known as temporary transfers.

(b) Where there is not sufficient work for an employee in his regular job classification, the Company may utilize the employee in a higher classification or a classification in the same labor grade on his shift. If so, the employee will receive the equivalent step of the same or higher labor grade. In selecting the employee to perform, the Company shall select the most senior.

(c) Where there is not sufficient work in an employee's classification, the Company may utilize the employee in a lower classification on his shift. If so, the employee shall receive his regular rate of pay. The least senior employee shall be selected for transfer to the lower classification.

(d) Under no circumstances will either of the methods outlined in (b) or (c) above be used to permanently fill an opening and thereby circumvent the normal job filling procedures.

Section 12. Layoff

When there is a reduction of the work force, the following procedures shall be followed:

(a) Within any classification in which reductions are made, probationary employees shall be laid off first.

(b) If further reductions in the work force are necessary within any classification, employees shall be removed first from such job classification in accordance with their seniority provided that the remaining employees are capable of performing the remaining work.

(c) Any seniority employee may exercise his seniority in any other classification in the same or a lower labor grade in his job family, displacing employees with less seniority, provided that the senior employee shall have the ability to perform the work.

(d) A displaced seniority employee may also exercise his seniority in any classification in another job family, provided he previously held such classification at ITT Gilfillan and that he has skill and ability relatively equal to the employee whom he seeks to replace. If he replaces and it is determined within five (5) working days that a mistake was made and the employee cannot perform, he will be laid off in accordance with the provisions of Section 12 with the exception of this paragraph.

(e) If a displaced employee refuses to exercise any of the options available to him under the provisions of Section 12 (c) and (d), he shall be deemed to have voluntarily terminated his employment with the Company and shall lose any recall rights under the Collective Bargaining Agreement except as provided in Section 12(f).

(f) If the only option or options available to the displaced employee would place him in a classification resulting in a reduction of his hourly rate of pay, the displaced employee has the option of accepting the lower-rated classification or being placed on layoff status. If the employee elects to be laid off, he waives recall rights except to his highest classification, unless the employee notifies the Company by return receipt letter or telegram that he wishes to be recalled to lower classifications. In that event he will be immediately placed on the recall list for all jobs for which he has recall rights and will be recalled in seniority order.

(g) An employee who is removed from his classification and displaces under the terms of paragraph (c) and (d) above may, seniority permitting, displace the least senior employee in the highest classification to which he has displacement rights on his present shift, rather

than change shifts. The least senior employee must then change shifts, seniority permitting, or be terminated from the Company. If the least senior employee is unable to change shifts by reason of seniority, he may exercise his seniority in accordance with paragraph (c), (d), (e) and (f) above.

Section 13. Recalls

Employees shall be recalled from layoff in seniority order in the job family, or families, from which they were displaced as a result of a reduction in force. As openings occur in the classification from which an employee was removed due to a reduction in force he will be returned to that classification in seniority order.

An employee must accept recall to the highest classification to which he is entitled to return to work.

Employees who, in accordance with this Article, are eligible to fill a job vacancy by being recalled from layoff will be notified by the Company either by telephone, or by return receipt telegram or certified letter to the employee's last address on record, it being the responsibility of the employee to keep the Company informed of his current correct address. The Company may fill the opening on a temporary basis pending the return of such employee. An employee so notified shall report for work or notify the Company of his intention to report for work within two (2) working days after receiving notice of recall. The employee shall return to work at the agreed upon date, but not later than five (5) working days after receipt of such notice. If an employee fails to comply with any of the provisions of this section, the Company may immediately recall, in lieu of such employee, the employee next eligible for recall to fill the available position and the non-complying employee shall be terminated.

Section 14. Returning to the Bargaining Unit

Employees heretofore or hereafter selected for positions outside the Bargaining Unit and who are thereafter laid off may return to the Bargaining Unit and be placed in the same job classification from which they were selected, if qualified, in accordance with the following:

(a) Employees heretofore transferred into positions outside the Bargaining Unit shall retain their seniority up to March 1, 1973 but not accumulate seniority beyond that date.

(b) Employees who hereafter transfer into non-bargaining unit jobs within the Company will accumulate seniority for an additional year and then will retain, but not accumulate, seniority thereafter.

In case they do not have sufficient seniority to displace present employees in said job classifications, they shall be considered as though they had been laid off from those classifications and will be entitled to displace employees of lesser seniority in other classifications for which they are qualified and to which they are entitled under the provisions of Sections 12 and 13 of this Article.

* * *

ARTICLE XXII
VACATIONS

Section 1. Eligibility

Eligible employees shall receive annual vacation pay as follows:

(a) Employees with one (1) or more years, but less than ten (10) years of seniority, shall be eligible for two (2) weeks of vacation with pay at the rate in effect at the time vacation is taken.

(b) Employees with ten (10) or more years, but less than twenty (20) years of seniority, shall be eligible for three (3) weeks of vacation at the rate of pay in effect at the time the vacation is taken;

(c) Employees with twenty (20) or more years of seniority shall be eligible for four (4) weeks of vacation at the rate of pay in effect at the time the vacation is taken.

Section 2. Accrual Rates

Any employee who has completed 1600 hours of work or who was off in pay status during his accrual year will receive vacation in accordance with Section 1 (a) (b) (c) of Article XXII, an employee who fails to work the full 1600 hours will receive vacation in accordance with the following accrual rates:

(a) An employee in Section 1 (a) above will accrue vacation time at the rate of 6.66 hours for each month in which the employee worked, or was off in pay status, at least 120 hours.

(b) An employee in Section 1 (b) above will accrue vacation time at the rate of ten (10) hours for each month in which the employee worked, or was off in pay status, at least 120 hours.

(c) An employee in Section 1 (c) above will accrue vacation time at the rate of 13.33 hours for each month in which the employee worked, or was off in pay status, at least 120 hours.

Section 3. Time for Taking Vacation

Vacation shall be taken within one (1) year after the employee's anniversary date, provided that one vacation shall not be taken within two (2) months of the next vacation. Vacations shall be scheduled to provide minimum interference with production requirements. So far as practical,

vacation time preference will be given to employees with the greatest seniority.

Section 4. Vacation Payment

Employees will receive their vacation pay on the last regularly-scheduled work day prior to the beginning of vacation at their regular straight-time hourly rate of pay on that day. Employees on the second and third shift on the last scheduled work day prior to their vacation will receive their normal shift premium during the vacation. Employees on leadman status the last scheduled work day prior to the vacation will receive their leadman bonus during the vacation.

(a) Payment in lieu of vacation shall not be permitted except upon the request of the employee and the written approval of the Director of Employee Relations.

(b) Employees who have passed their anniversary date and are entitled to but have neither taken or been paid for the vacation to which they would have been entitled under the provisions of Sections 1 and 2 of this Article shall be paid such vacation pay upon termination of their employment for the following reasons only:

1. layoff for lack of work
2. retirement under the provisions of the ITT Gilfillan Pension Plan for Hourly Rated Employees dated March 28, 1966, as amended herein;
3. discharge;
4. voluntary termination;
5. death of the employee, in which case payment shall be made to the employee's heirs or to his estate.

(c) Prorata vacation pay accrued since the last anniversary date shall be paid to employees for termination of their employment for the following reasons only:

1. layoff for lack of work;

2. retirement under the provisions of the ITT Gilfillan Pension Plan for Hourly Rated Employees dated March 28, 1966, as amended herein;

3. discharge (for other than disciplinary reasons);

4. voluntary termination;

5. death of the employee, in which case payment shall be made to the employee's heirs or to his estate.

* * *

ARTICLE XXIII
SICK PAY

Section 1.

Employees who have completed one (1) year or more of seniority during any calendar year, and who have completed 1600 hours of work or who were off in pay status, in which this contract is in effect shall receive a maximum of 40 hours sick pay. For purposes of this Article an employee's qualifying year shall begin on his anniversary date in the appropriate calendar year and end on his anniversary date the following year. For each month during the qualifying year in which an employee works or is on pay status for at least 120 hours, he shall be entitled to 3.333 hours of sick pay. After March 1, 1974 employees will receive a maximum of forty-eight (48) hours of sick pay.

Section 2.

Sick pay earned but not used prior to the end of the qualifying year shall be paid to the employee on his anni-

versary date. Sick pay may not be accumulated from year to year.

ARTICLE XXIV
HOURS OF WORK AND OVERTIME

Section 1. Work Day and Work Week Defined

Eight (8) consecutive hours (exclusive of lunch period) shall constitute the normal work day for employees working the first and second shifts. The normal work weeks shall be Monday through Friday. This section does not guarantee the number of hours or the days that an employee may work during the work week, nor does it constitute a limitation on the number of hours he may be required to work in such a work week.

ARTICLE XXV
HOLIDAYS

Section 1.

The Company recognizes the following annual holidays for holiday pay purposes:

1. New Year's Day
2. Memorial Day
3. Independence Day
4. Labor Day
5. Thanksgiving Day
6. Day after Thanksgiving
7. December 24th
8. Christmas
9. December 31st

10. One floating holiday to be decided by the Company at its sole discretion.

Section 2.

The above-mentioned holidays, when not worked by an employee, shall be paid as hereinafter provided, if the following requirements are met:

(a) The employee must be actively employed.

(b) The employee must have worked on the last scheduled work day prior to and on the next scheduled work day after the holiday.

An employee will be excused from compliance with requirement (b) because of personal illness or disability or death in the employee's immediate family or other circumstances recognized and approved by the Company. Proof acceptable to the Director of Employee Relations or a designated representative of the reasons for such absence may be required as substantiation of their validity.

Section 3.

When a holiday falls on a Sunday, the following Monday shall be observed as a holiday. When a holiday falls on a Saturday, the holiday shall be observed on the previous Friday.

If a holiday falls during the employee's vacation period, payment for the holiday will be added to the paycheck of the employee after he returns from his vacation.

Section 4.

The rate of pay for holidays not worked by employees will be figured on eight (8) hours at the employee's regular straight time hourly rate. Employees on the 2nd or 3rd shift on the day before the holiday will receive shift premium for the holiday. Employees on leadman status the day before the holiday will receive their leadman bonus for the holiday.

Section 5.

If an employee is required to work on a designated holiday, he shall receive, in addition to his holiday pay, compensation for all hours actually worked on such holiday at one and one-half (1½) times his regular straight time hourly rate.

Section 6.

An employee who is scheduled and agrees to work on a holiday and fails to do so forfeits his right to receive holiday pay for that day.

ARTICLE XXVI
BEREAVEMENT PAY

Section 1.

In the event of death in the immediate family of the employee, he will be allowed three (3) days off with pay computed at his basic hourly rate provided he has completed his probationary period with the Company. For purposes of this Section, immediate family is defined to include spouse, mother, father, children, brother or sister of the employee or the parents of the employee's current spouse.

Section 2.

Verification may be requested by the Company and it shall be submitted to the Employee Relations Department.

ARTICLE XXVII
JURY DUTY

Section 1.

Any senior employee who is summoned and reports for jury duty, as prescribed by applicable law, shall be paid by

the Company an amount equal to the difference between the amount of wages an employee otherwise would have earned by working during straight time hours on that day and the daily jury fee paid by the Court (not including travel allowances or reimbursement of expenses) for each day on which he otherwise would have been scheduled to work for the Company, not to exceed a maximum of thirty (30) days in any calendar year. Such compensation shall not be payable if the employee:

(a) Fails to give the Company notice three (3) working days prior to the commencement of such jury duty; or

(b) Fails to present evidence that he has reported for and/or performed jury duty, and the amount of compensation received by the employee for such jury duty; or

(c) Performs such jury duty on a holiday or while on leave, vacation, or in any other pay status with the Company.

Section 2.

A senior employee who is summoned and reports for an interview and examination to determine his qualifications for jury duty shall receive a maximum of four (4) hours time off with pay for that purpose if the interview and examination is conducted on a day on which the employee would otherwise have been scheduled to work for the Company and if the employee gives the Company notice thereof at least three (3) working days prior to the interview and examination.

Section 3.

An employee on jury duty status will report to work when not required to report to the court or is excused from jury duty early on any given day which is a regular scheduled

work day. An employee on the first shift who is excused from jury duty early must work the balance of his shift, if he is excused in time to report and complete three (3) or more hours of work. An employee on the second shift who is excused from jury duty before 1:00 p.m. must report and work the first four (4) hours of his regular scheduled shift. Failure to report for work as specified will result in forfeiture of jury duty differential pay for that day as provided herein.

Section 4.

Employees who volunteer for jury duty or employees with less than sixty (60) days of service will be authorized time off for jury duty without pay.

Section 5.

The Company reserves the right to request exemption from jury service of any employee whose absence would have a detrimental effect on the performance of the Company.

* * *

ARTICLE XXXI
GROUP INSURANCE AND HOSPITALIZATION

It is agreed that the Company will continue in effect during the term of this Agreement the present group insurance and hospitalization plan designated "ITT Gilfillan Hourly Group Insurance and Hospitalization Plan" with the following exceptions:

(a) The life insurance benefits for the employees shall be $7,000.

(b) The accidental death and dismemberment benefits for the employees shall be $7,000.

(c) The maximum number of covered days for hospital room and board shall be 181 days.

(1) Maximum total payment for the first 31 days shall be increased from $55 per day to $70.00 per day.

(2) Maximum total payment for the remaining 150 days shall be increased from $40.00 per day to $52.00 per day.

* These benefits are integrated with California UCD hospital benefits.

(d) Major medical coverage shall be increased from $10,000 to $15,000.

(e) Any employee so desiring may, while on approved medical leave of absence, maintain the group insurance coverage for his dependents by paying the Company the dependent coverage amount of $1.00 per week billed monthly in advance.

ARTICLE XXXII
PENSION

The Pension Plan designated as "The ITT Gilfillan Pension Plan for Hourly Employees" dated January 31, 1964, as amended, is incorporated by reference in this contract. The highlights of the Pension Plan, as amended, are attached as Appendix C.

* * *

STANDARD HOURLY WAGE STRUCTURE

Labor Grade	Minimum Rate	Step I	Step II	Step III	Step IV	Step V	Step VI	Step VII	Step VIII	Step IX	Maximum Rate Schedule1
1973-1974 (Effective 3-1-73)											
1	2.69	2.84	3.00	3.06	3.11	3.16	3.22	3.27	3.33	3.38	3.45
2	2.85	3.00	3.16	3.22	3.27	3.33	3.38	3.43	3.49	3.54	3.64
3	3.07	3.22	3.38	3.43	3.49	3.54	3.60	3.65	3.70	3.76	3.88
4	3.35	3.48	3.55	3.61	3.68	3.74	3.81	3.87	3.94	4.00	3.07
5	3.57	3.70	3.77	3.83	3.89	3.96	4.03	4.09	4.15	4.22	4.32
6	3.80	3.93	3.99	4.06	4.12	4.19	4.25	4.32	4.38	4.45	4.51
7	3.91	4.06	4.13	4.21	4.29	4.36	4.43	4.51	4.59	4.66	4.74
8	4.23	4.38	4.46	4.53	4.61	4.68	4.76	4.84	4.91	4.99	5.07
9	4.47	4.62	4.69	4.77	4.85	4.92	5.00	5.08	5.15	5.22	5.30
10	4.70	4.86	4.93	5.01	5.09	5.16	5.23	5.31	5.39	5.46	5.54

Labor Grade	Minimum Rate	Step I	Step II	Step III	Step IV	Step V	Step VI	Step VII	Step VIII	Step IX	Maximum Rate
1974-1975 (Effective 3/1/74)											Schedule 2
1	2.89	3.04	3.20	3.26	3.31	3.36	3.42	3.47	3.53	3.58	3.65
2	3.05	3.20	3.36	3.42	3.47	3.53	3.58	3.63	3.69	3.74	3.84
3	3.27	3.42	3.58	3.63	3.69	3.74	3.80	3.85	3.90	3.96	4.08
4	3.55	3.68	3.75	3.81	3.88	3.94	4.01	4.07	4.14	4.20	4.27
5	3.77	3.90	3.97	4.03	4.09	4.16	4.23	4.29	4.35	4.42	4.52
6	4.00	4.13	4.19	4.26	4.32	4.39	4.45	4.52	4.58	4.65	4.71
7	4.11	4.26	4.33	4.41	4.49	4.56	4.63	4.71	4.79	4.86	4.94
8	4.43	4.58	4.66	4.73	4.81	4.88	4.96	5.04	5.11	5.19	5.27
9	4.67	4.82	4.89	4.97	5.05	5.12	5.20	5.28	5.35	5.42	5.50
10	4.90	5.06	5.13	5.21	5.29	5.36	5.43	5.51	5.59	5.66	5.74

Labor Grade	Minimum Rate	Step I	Step II	Step III	Step IV	Step V	Step VI	Step VII	Step VIII	Step IX	Maximum Rate
1975-1976 (Effective 3/4/75)											Schedule 3
1	3.09	3.24	3.40	3.46	3.51	3.56	3.62	3.67	3.73	3.78	3.85
2	3.25	3.40	3.56	3.62	3.67	3.73	3.78	3.83	3.89	3.94	4.04
3	3.47	3.62	3.78	3.83	3.89	3.94	4.00	4.05	4.10	4.16	4.28
4	3.75	3.88	3.95	4.01	4.08	4.14	4.21	4.27	4.34	4.40	4.47
5	3.97	4.10	4.17	4.23	4.29	4.36	4.43	4.49	4.55	4.62	4.72
6	4.20	4.33	4.39	4.46	4.52	4.59	4.65	4.72	4.78	4.85	4.91
7	4.31	4.46	4.53	4.61	4.69	4.76	4.83	4.91	4.99	5.06	5.14
8	4.63	4.78	4.86	4.93	5.01	5.08	5.16	5.24	5.31	5.39	5.47
9	4.87	5.02	5.09	5.17	5.25	5.32	5.40	5.48	5.55	5.62	5.70
10	5.10	5.26	5.33	5.41	5.49	5.56	5.63	5.71	5.79	5.86	5.95

* * *

APPENDIX C

HIGHLIGHTS OF ITT GILFILLAN PENSION PLAN FOR HOURLY EMPLOYEES

Effective Date		January 31, 1964 as amended through March 1, 1973
Eligibility for Membership		All regular hourly paid employees of the Company at specified locations on 1/31/64 will become members on after 1/31/64 provided after they are less than age 62. Regular hourly paid employees hired 1/31/64 become members when they complete three years of service and are less than age 65.
Normal Retirement Age		Age 65
Benefit	(a)	The sum of: $6.50/month per year of Credited Service on and after 3/1/74 + $4.25/month per year of Credited Service on and after 8/1/71 up to and including 2/28/74 + $4.00/month per year of Credited Service prior to 8/1/71 to a maximum of 18 years of Credited Service prior to 8/1/71. Total Credited Service shall be a combined maximum of thirty years and shall be those thirty years immediately preceding retirement.

(b) For retirements on and after 3/1/74 the normal retirement benefit under the plan shall not exceed 70% of "Final Earnings" including 70% of the annual Primary Social Security Benefit. For an employee with less than thirty years of Credited Service, such normal retirement benefit will be reduced proportionately, i.e. 2.33% of "Final Earnings" and 2.33% of Primary Social Security Benefits for each year of Credited Service less than thirty years. "Final Earnings" shall mean the average annual base compensation of a participant for the five highest consecutive years of Credited Service in the ten years of Credited Service immediately preceding retirement.

Disability Retirement

Eligibility — Age 50 and 15 years of Credited Service accumulated after 1/31/64.

Benefit — The sum of: $6.50/mo. per year of Credited Service on and after 3/1/74 +

$4.25/mo. per year of Credited Service on and after 8/1/71 up to and including 2/28/74 +

$4.00/mo. per year of Credited Service prior to 8/1/71 to a combined maximum of 30 years of Credited Service. Minimum Disability Benefit: $75/mo. payable to age 65. Disability pension is reduced by benefits payable under any Occupational Diseases Laws.

For disability retirements on and after 3/1/74 the disability retirement benefit under the plan shall not exceed 70% of "Final Earnings" including 60% of the annual Primary Social Security Disability Benefit. For an employee with less than 30 years of Credited Service, the maximum disability retirement benefit will be reduced proportionately, i.e., 2.33% of "Final Earnings" and 2% of Primary Social Security Disability Benefit for each year of Credited Service less than 30 years. The Social Security Benefit will be determined assuming the employee had attained age 65 as of his date of disability and the assumption will be made that the disabled employee is entitled to receive a Primary Social Security Disability Benefit. "Final Earnings" shall mean the average annual base compensation of a participant for the five highest consecutive years of Credited Service in the ten years of Credited Service immediately preceding retirement.

Vesting

Eligibility	Age 50 and 10 years of Credited Service.
Benefit	The sum of: $6.50/mo. per year of Credited Service on and after 3/1/74 + $4.25/mo. per year of Credited Service on and after 8/1/71 up to and including 2/28/74 + $4.00/mo. per year of Credited Service prior to 8/1/71 to a combined maximum of 30 years of Credited Service. For termination on and after 3/1/74 the vested pension benefit shall not exceed the normal retirement as determined under (b) above accrued to date of termination. The Primary Social Security Benefit will be determined assuming the employee had continued in service to age 65 at his rate of compensation in effect at his date of termination.
Minimum Benefit	A member with 15 or more years of Credited Service on 3/1/73 who reaches normal retirement from 3/1/73 to 3/1/76 will receive a pension equal to $4.25 per month per year of Credited Service up to a maximum of 19 years of Credited Service prior to 3/1/74 or a maximum of $80.75/month.

Early Retirement Eligibility	Company Option: On or after age 60. Employee Option with Company Consent: (i) Age 55 and 15 years of Credited Service or (ii) After age 60 if on the payroll on 6/1/67 and would have completed 15 years of Credited Service upon attainment of normal retirement date.
Benefit	Accrued normal pension benefit as determined under (a) above payable immediately actuarially reduced or accrued normal pension benefit payable at age 65 without reduction. Employees under (ii) above receive actuarial equivalent of $63.75 less $4.25 for each year retirement age is less than age 65. For early retirements on or after 3/1/74 the early retirement benefit shall not exceed the normal retirement benefit as determined under (b) above accrued to early retirement date, actuarially reduced if payable before age 65. The Primary Social Security Benefit will be determined at the time of early retirement assuming the employee had no earnings after his early retirement date, and integration with the early retirement pension benefit will be made at and after age 62.

Excerpts from Joint Trial Exhibit B
— UAW Constitution —

CONSTITUTION
of the
INTERNATIONAL UNION
United Automobile
Aerospace and
Agricultural Implement
Workers of America,
UAW

Adopted at
Los Angeles, California
June, 1974

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ARTICLE 32
Public Review Board

Section 1. For the purpose of insuring a continuation of high moral and ethical standards in the administrative and operative practices of the International Union and its subordinate bodies, and to further strengthen the democratic processes and appeal procedures within the Union as they affect the rights and privileges of individual members or subordinate bodies, there shall be established a Public Review Board consisting of impartial persons of good public repute, not working under the jurisdiction of the UAW or employed by the International Union or any of its subordinate bodies.

Section 2. The Public Review Board shall consist of seven (7) members, including the chairman. Their terms shall be for the period between International Constitutional Conventions. At the Sixteenth (16th) International Constitutional Convention, and at the subsequent International Constitutional Conventions, the International President shall, subject to the approval of the International Executive Board, propose the names of the chairman and members of the Public Review Board for ratification by said International Constitutional Convention. Should any vacancy on the Public Review Board occur between International Constitutional Conventions, the vacancy shall be filled by appointment by the International President, subject to the approval of the International Executive Board, from a list of names submitted by the remaining members of the Public Review Board.

Section 3. (a) The Public Review Board shall have the authority and duty to make final and binding decisions on all cases appealed to it in accordance with Article 33 of the International Constitution, and to deal with matters related

to alleged violation of any UAW ethical practices codes that may be adopted by the International Union.

(b) The Public Review Board shall have the authority and duty to make final and binding decisions on all cases appealed to it in accordance with Article 16, Section 7, of the International Constitution.

Section 4. Any complaint filed under Sections 5(a) or (b) of this Article, alleging violation of any UAW ethical practices codes that may be adopted by the International Union, must be filed within sixty (60) days of the time the charging member first becomes aware or reasonably should have become aware of the alleged violation.

Section 5. To facilitate the orderly handling of complaints related to alleged violations of any UAW ethical practices codes, the following procedures shall apply:

(a) If a complaint is against the operation of a subordinate body or any officer or representative thereof, the complaint must be initiated by a member of that subordinate body who shall be obligated to first attempt to seek redress and correction of the matter complained of through appeal to the membership of the Local Union. Failing to get redress from the Local Union, the member shall submit his complaint to the International Executive Board through the International President who shall forward a copy of the complaint directly to the chairman of the Public Review Board. The International Executive Board shall have the initial responsibility for investigating the complaint. The chairman of the Public Review Board will be kept advised of the case by the International Executive Board. Upon completion of the International Executive Board's investigation and action, the chairman of the Public Review Board and the complaining member will be informed as to the disposition made

of the case by the International Executive Board. In the event the complaining member is dissatisfied with the decision and action of the International Executive Board, he may, within thirty (30) days, appeal such decision to the Public Review Board. In the absence of such an appeal, the Public Review Board may act on the matter if it concludes that there is substance to the original complaint and that the action of the International Executive Board does not satisfactorily meet the problem.

(b) If a complaint is against the operation of the International Union or any officer or representative thereof, the complaint must be made by a member of a Local Union and approved by membership action of that Local Union. The complaint and a certification of the approval shall be submitted to the International President who shall forward a copy of the complaint directly to the chairman of the Public Review Board. The complaint shall be processed by the International Executive Board and the Public Review Board in the same manner as a complaint under (a) above.

(c) However, if any member files a complaint under either Sections (a) or (b) above but does not seek approval, redress or action from his Local Union, he shall set forth the reasons for his failure to seek or obtain such approval, redress or action from his Local Union at the time he files his complaint with either the International Executive Board or the Public Review Board. When, in the judgment of the International Executive Board and/or the Public Review Board there are valid and substantial reasons for the request to bypass the Local step, the matter may be processed without compliance with the Local step.

(d) Any matter within the coverage of this Section may be submitted to the Public Review Board by majority action of the International Executive Board.

When a complaint is properly before the Public Review Board, the Public Review Board shall assume jurisdiction over the matter complained of and process the matter in accordance with the provisions of subsequent Sections of this Article.

Section 6. The Public Review Board shall formulate such rules of procedure and establish such practices as are necessary to facilitate its proper functioning. In order to minimize the time requirements and to expedite the disposition of cases, the chairman shall be authorized to create panels of not less than three (3) members of the Public Review Board to act for and in behalf of the Public Review Board. When, as a result of preliminary investigation, the Public Review Board, or the panel thereof, concludes that the complaint fails to state allegations sufficiently serious and substantial to justify a hearing, or when it appears that there is no reasonable possibility that any substantial evidence in support of the allegations can be produced, the Board or the panel, in its discretion may dismiss such matter without any hearing. The Public Review Board, or the panel thereof, shall advise the complaining member, the International Union, and any subordinate body or bodies concerned of its decision or findings.

Section 7. In case the Public Review Board or the panel thereof finds that the accused is obviously innocent of any violation of the ethical codes, the Board, or the panel thereof, may make judgment with respect to the lack of good faith of the accuser, and if the facts indicate that the accuser acted in bad faith or with malicious intent and in a willful effort to divide and disrupt the Union, the Public Review Board may assess a penalty against the accuser;

provided, however, that such penalty shall be limited to the following: a fine of not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00) with automatic suspension in the event of the failure of the member to pay the fine within a specified time; and/or suspension from membership for a period of not less than three (3) months.

Section 8. The Public Review Board shall prepare and submit to the membership an annual report of its activities, in which report it shall draw the attention of the membership to any situation or action which it has investigated upon complaint and found to be improper, and shall comment upon the steps that have been taken by the Union to correct such situation. The Public Review Board shall further include a summary of all appeals it has handled during the year. Copies of the Public Review Board's annual report shall be mailed to all Local Unions and notice of this fact shall be published in the next edition of Solidarity. Copies shall be available to members upon request and during convention years copies shall be distributed to all delegates. The annual report shall be made available to the public press and all other media of public communication. The Public Review Board may, in its discretion, submit an interim report. Such interim report shall also be made available to all members and the public in the same manner as the annual report.

Section 9. The International Executive Board is instructed and authorized to provide for an annual operating budget to insure the proper functioning of the Public Review Board. The International Secretary-Treasurer is instructed and authorized to deposit quarterly in a depository designated by the Public Review Board to the account of the Public Review Board the necessary funds required by the budget submitted by them. Such budget shall cover all necessary expenses,

including office, staff, travel and operating expenses, and shall provide for reasonable compensation to the members of the Public Review Board. The Public Review Board shall establish an office separate and apart from any union building. The staff and office personnel essential to the proper functioning of the Public Review Board shall be selected by the members thereof and shall be compensated out of its operating budget. The chairman of the Public Review Board shall be required to have its books and financial records audited annually; such audits and the summary of the financial transactions shall be submitted to the International Secretary-Treasurer, who in turn shall make such information available to the delegates at each Constitutional Convention.

ARTICLE 33
Appeals

Section 1. All subordinate bodies of the International Union, and members thereof, shall be entitled to the right of appeal. In all cases, however, the decision of the lower tribunal must be complied with before the right to appeal can be accepted by the next tribunal in authority, and shall remain in effect until reversed or modified. The International President may, upon written application by an appellant waive in whole or in part requirements of such compliance, where unusual circumstances would warrant such waiver.

Section 2. Any member of any Local Union or unit of an Amalgamated Local Union who wishes to challenge any action, decision or penalty of that body or of any official or representative of that body must, in all cases and procedures where no other time limit is specifically set forth by this Constitution, initiate the challenge before the ap-

propriate body of such Local Union or unit within sixty (60) days of the time the challenger first becomes aware or reasonably should have become aware of the alleged action, decision, or penalty of that body.

Section 3. Any member of an Amalgamated Local Union wishing to appeal from any action, decision or penalty of his unit shall first appeal such action, decision or penalty to the Amalgamated Local Union's delegate body, where such exists, or the general membership meeting, where no delegate body exists. This appeal shall be taken by submitting a written notice of appeal to the Amalgamated Local Union's Recording Secretary within thirty (30) days of the unit's action, decision, or penalty being appealed from. The Amalgamated Local Union shall review the appeal, with the aid of an investigating committee or otherwise, and shall determine the appeal, but if a Unit Trial Committee is involved in the proceedings, it shall not select its own Trial Committee to retry the case. An appeal from the decision of the Amalgamated Local Union shall be carried to the International Executive Board.

Section 4. Any member or subordinate body appealing from any action, decision or penalty of any subordinate body, shall be permitted representation before any reviewing body by counsel of his own choice. The appellant and/or counsel shall be afforded full opportunity to present to any reviewing body the appellant's position on all matters bearing upon the action, decision or penalty under review; providing that this right to appear shall be limited to an appearance before a committee or panel of any reviewing body where the reviewing body has established the committee or panel to conduct a hearing and submit recommendations to the full reviewing body.

Section 5. Any member feeling himself aggrieved by any action, decision or penalty of his subordinate body shall be

entitled to appeal that action, decision or penalty to the International Executive Board only when it has been passed upon by the Local Union membership or delegate body, as the case may be; except where direct appeal to the International Executive Board from some action, decision or penalty of a body other than the Local Union membership or delegate body shall be specifically permitted by another Article of this Constitution. An appeal to the Local Union may be made at a meeting or in writing to the Recording Secretary. An appeal to the International Executive Board may be made without action by the membership or delegate body if the membership or delegate body does not meet and act on the appeal within forty-five (45) days following the appeal to the Local Union. When no membership or delegate body meeting is held during this forty-five (45) day period the Local Union Executive Board may consider and pass on the appeal.

Section 6. Any member wishing to appeal from the action, decision or penalty of his subordinate body shall do so in writing within thirty (30) days after the aforesaid action, decision or penalty. He shall send such appeal to the International Union President and should send a copy of the appeal to the Recording Secretary of the subordinate body. The appeal should set forth the action, decision or penalty being appealed and should include any and all information available in support of the appeal. The International President shall secure from the subordinate body a complete statement of the matters in issue, including copies of all charges, and any records, minutes, transcripts of testimony and other material relating to the appeal.

Section 7. (a) The International Executive Board shall appoint a two (2) member committee to consider the appeal and make recommendations. This two (2) member committee shall be composed of members of the International

Executive Board, but shall not include the Regional Director of the region from which the appeal originates. The appeal and any information secured by the International President, pursuant to Section 6 of this Article, shall be forwarded to the committee. After a review of the appeal the committee may hold a hearing, before either the full committee or, in its discretion, one of its members, unless the committee concludes that no useful purpose would be served by a hearing, in which event the committee, in its discretion may make recommendations on the appeal without a hearing. If a hearing is held, it shall be held as close to the locality from which the appeal originates as is possible in order to minimize expense and inconvenience to the appellant. The appellant and appellee (or their representatives) shall be required to appear before the Appeals Committee, with such counsel and witnesses as they may choose, and shall answer fully and truthfully all questions put to them by members of the Appeals Committee. The extent and scope of the hearing shall be such as in the discretion of the committee shall bring to light all facts and issues involved. The appellant and/or appellee shall each be entitled to submit any briefs or any other written statements of position that either of them may wish. The committee shall consider the files and records of the case, and such briefs as may be submitted by either side. Based upon this consideration, the Appeals Committee shall make a recommendation which, together with all of the aforesaid documents, shall be submitted to a nine (9) member committee of the International Executive Board, of which five (5) members shall constitute a quorum. The nine (9) member committee of the International Executive Board shall consider said documents, together with the Appeals Committee recommendation, and shall make a decision on the appeal.

(b) The International President may decide an appeal, rather than submitting it to a two (2) member committee of the International Executive Board, if he concludes that such procedure is appropriate. In such case, the International President may designate a representative to conduct any investigation or hearing deemed necessary, in accordance with the procedures set forth in subsection (a) hereof. The International President shall base his decision on the files and records of the case, and such briefs as may be submitted by either side.

(c) Both where the appeal has been decided by the nine (9) member committee of the International Executive Board and where it has been decided by the International President, copies of the decision shall be sent to all members of the International Executive Board and the decision shall become the decision of the International Executive Board unless, within ten (10) days, one or more members of the International Executive Board shall raise an objection to the decision, in which case the appeal shall be referred, for decision, to the International Executive Board at its next regular meeting. The International President shall promptly notify all parties concerned of the decision of the International Executive Board. The International Executive Board shall use its best efforts to render its decision within sixty (60) days of receipt of the appeal by the International President.

Section 8. Any subordinate body or member thereof wishing to appeal from any decision of the International Executive Board or an International Trial Committee may, in all cases, take such appeal to the Constitution Convention Appeals Committee of the International Union. The Convention Appeals Committee shall have the authority to consider and decide all appeals submitted to it from decisions of the International Executive Board and International Trial Com-

mittees under this Section. All decisions of the Committee shall be final and binding.

The Constitution Convention Appeals Committee shall consist of a member and a first and second alternate from each region selected by lot from the delegates when they elect their Regional Director. At the 23rd Constitutional Convention half the regions shall select members and alternates to serve on the Committee for a two (2) year term and half shall select members and alternates to serve for a four (4) year term. It shall be decided by lot which regions are to select for a two (2) year term and which are to select for a four (4) year term. At each succeeding Constitutional Convention the regions whose members' terms then expire shall select members and alternates to serve for a four (4) year term. In the event a vacancy occurs on the Committee, it shall be filled by the ranking alternate from that region. All remaining vacancies shall be filled by lot at the next Constitutional Convention.

The Convention Appeals Committee shall meet semi-annually, at International Union Headquarters, to act upon all appeals that have been submitted under this Section at least thirty (30) days prior to the date established for their meeting. The administrative procedures for the Convention Appeals Committee shall be established by the International Executive Board, subject to review by subsequent regular Constitutional Conventions.

The appellant shall, however, have the alternative of appealing such decision of the International Executive Board or an International Trial Committee to the Public Review Board established in Article 32 of this Constitution in the following cases:

(a) Any case arising under the procedure set forth in Article 10 (Section 13), Article -12 (Sections 2 and

3), Articles 30 and 31, Article 33 (Sections 9 and 12), Article 36 (Sections 9 and 10), Article 38 (Sections 11 and 12), Article 48 (Sections 5 and 6) of this Constitution, or

(b) Those cases decided by an administrative arm of the International Executive Board, pursuant to Article 12, Section 17, or by the International Executive Board, which concern action or inaction relative to the processing of a grievance, in which the appellant has alleged before the administrative arm or the International Executive Board that the grievance was improperly handled because of fraud, discrimination, or collusion with management.

(c) In any other case in which the International Executive Board has passed upon an appeal from the action of a subordinate body.

Section 9. Regardless of which alternative the appellant decides to utilize, he must take the appeal within thirty (30) days of notification of the International Executive Board's decision, (unless such time is extended by the International Union President, where, in his opinion, justice will be served by such an extension), by serving a notice of appeal upon and filing a written statement of his reasons for appeal with the International President.

Section 10. If the appellant elects to appeal to the Public Review Board, the appeal shall be considered by the Board or a panel thereof. The International President shall forward to the chairman of the Public Review Board all documents and records in the case. After studying said documents and records, the Board or the panel shall hold a hearing; provided that where the Board or panel concludes after preliminary consideration and/or investigation that the appeal is insubstantial or that no useful purpose would be served by a

hearing, the Board may, in its discretion, decide or dismiss the appeal without a hearing. The extent and scope of the hearing, as well as other matters of procedure and timing, shall be controlled by the rules of procedure which shall be established for such hearings by the full Board pursuant to Article 32, Section 6.

Section 11. The Board or panel thereof shall, upon due consideration, issue its decision which shall be final and binding upon all parties. In cases coming within Section 8 of this Article, with the exception of cases concerning the processing of grievances, the Board or panel shall decide and dispose of all matters raised by the appeal. In cases that do involve the processing of grievances, the Board or panel shall first determine whether the specific allegation upon which the appellant claims the Board's or panel's jurisdiction to be based is, or is not, true. If such allegation is found to be true, the Board or panel shall proceed to dispose of all facets of the appeal; provided that in no event shall the Public Review Board have the jurisdiction to review in any way an official collective bargaining policy of the International Union. If the Board or the panel shall decide that such jurisdictional allegation is not true, it shall dismiss the appeal in which event the appellant shall, within thirty (30) days of notification of such dismissal, be entitled to appeal the matter to the Constitutional Convention of the International Union; provided that in such appeal, the appellant may not again raise any issue which the Board or the panel negated in its decision dismissing for lack of jurisdiction.

Section 12. It shall be the duty of any member or subordinate body who feels aggrieved by any action, decision,

or penalty imposed upon him or it, to exhaust his or its remedy and all appeals therefrom under the laws of this International Union prior to appealing to a civil court or governmental agency for redress.

* * *

Joint Trial Exhibit C
— Letter of Ralph S. Gazzigli —

July 11, 1975

Mr. Norman L. McCracken
Field Examiner
National Labor Relations Board
Region 31
11000 Wilshire Boulevard, 12th Floor
Los Angeles, California 90024

Dear Mr. McCracken:

After a most thorough investigation, and acting as a duly authorized International Representative of the UAW, my conclusion in regards to Mr. Clifford Clayton's termination from employment on February 14, 1975 at ITT Gilfillan was for just cause and in no way was a result of Mr. Clayton's Union activities, as Mr. Clayton contends.

Therefore, the Union will not take any further action on Mr. Clayton's grievance numbered 24060.

Briefly, this conclusion was based on the following:

A. Mr. Clayton was not acting in any capacity as a Union Representative at the time of the incident resulting in his discharge.

B. Although Clifford Clayton considers his actions to be trivial, the Union cannot and will not condone the distribution or possession of lewd pictures, books, devices, etc., on an employer's premises.

C. Mr. Clayton's testimony directly conflicts with two (2) eye witnesses to the event in question.

D. Not one of the other three people directly involved and present at the time of the incident will corroborate Mr. Clayton's version.

E. Clifford was fully aware of Company rules and had possession of same which clearly states, and I quote:

"Violations for which the employee will be suspended with a recommendation for discharge pending results of an investigation include, but are not limited to the following.....

(4) Immoral or indecent conduct."

I find this whole incident to be very unfortunate and distasteful. The UAW policies and philosophy has been and will remain to improve and provide a clean, safe and pleasant working environment. Mr. Clayton, as an elected representative, indeed, should have striven to set an example for his fellow employees. He took an oath to help provide and strive for those very goals.

However, this particular incident, I believe, based on my investigation, clearly shows that Mr. Clayton was not acting in a manner that his fellow employees, or employer, should be forced to tolerate, and in no way was related to Mr. Clayton's activities or position as a Union Steward.

Respectfully,

/s/ R.S.G.
Ralph S. Gazzigli
International Representative

RSG:ces
opeiu 42

cc: Clifford Clayton
Jack Milligan
Lois Casey

Excerpts from Joint Trial Exhibit E
— Affidavit of Jerry Dale —

In the United States District Court, Central District of California.

Clifford E. Clayton, Plaintiff, v. I.T.T. Gilfillan, a Division of International Telephone & Telegraph Corporation, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and its Local 509, Defendants. No. 76-0730-IH.

AFFIDAVIT OF JERRY DALE

With Attached and Incorporated Exhibits

No. 2 Solidarity, July 1966, p. 6;
No. 3 Solidarity, October 1967, p. 12;
No. 4 Solidarity, September 1968, p. 5;
No. 5 Solidarity, September 1970, p. 4;
No. 6 Solidarity, September 1971, p. 4;
No. 7 Solidarity, September 1972, p. 5;
No. 8 Solidarity, December 1973, p. 6;
No. 9 Solidarity, October 1974, p. 6;
No. 10 Solidarity, December 1975, p. 4;
No. 11 Solidarity, January 1977, p. 10.

In the United States District Court, Central District of California.

Clifford E. Clayton, Plaintiff, v. I.T.T. Gilfillan, a Division of International Telephone & Telegraph Corporation, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and its Local 509, Defendants. No. 76-0730-IH.

AFFIDAVIT OF JERRY DALE

With Attached and Incorporated Exhibits

STATE OF MICHIGAN)

)ss.

COUNTY OF WAYNE)

The undersigned, Jerry Dale, now being first duty sworn, on oath, deposes and says as follows:

I am employed by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, as Assistant Director of the Public Relations and Publications Department. I make this affidavit upon my personal knowledge.

With the exception of unprocessed address changes, each and every dues paying member of the UAW receives a copy of a newspaper published by the International Union (UAW) known as Solidarity. This has been the practice for many years, including between 1971 and today.

Copies of that publication which specifically refer to rights of members to appeal under the International Constitution are attached hereto and incorporated by this reference as Defendant Union's Exhibits No. 2, Solidarity,July 1966, p. 6; No. 3, Solidarity, October 1967, p. 12; No. 4, Solidarity, September 1968, p. 5; No. 5, Solidarity, September 1970, p. 4; No. 6, Solidarity, September 1971, p.

4; No. 7 Solidarity, September 1972, p. 5; No. 8, Solidarity, December 1973, p. 6; No. 9, Solidarity, October 1974, p. 6; No. 10 Solidarity, December 1975, p. 4; No. 11 Solidarity, January, 1977, p. 10.

Further Affiant sayeth not.

/s/ JERRY DALE
Jerry Dale

Subscribed and sworn to before me
this 25 day of February, 1977.

/s/ ELIZABETH PILOT
Elizabeth Pilot
Notary Public, Wayne County, Michigan
My Commission Expires September 17, 1980.

(Excerpts from *Solidarity* identified as Affidavit Exhibits Numbers 2-8 and 10-11 have been omitted in printing)

Exhibit No. 9
Solidarity, page 6
October, 1974

MORE MEMBERS ARE USING THE PRB, AGAIN PROVING ITS VALUE

'The UAW is almost unique . . . in voluntarily, on its own initiative, setting up this kind of Public Review Board and handing over to seven outsiders . . . the authority to make binding decisions.'

— Msgr. George C. Higgins

By Bobbie Barbee

More and more UAW members are becoming aware that the internal remedies and procedures for seeking justice in the UAW are within easy reach of anyone who feels he or she has been wronged through some action or inaction of the union.

Now going into its 18th year of existence since its creation by action of the delegates to the 16th Constitutional Convention of the UAW in April 1957, the Public Review Board has been an invaluable addition to the democratic safeguards inherent in the UAW Constitution.

In the recent submission of its 16th annual report to the membership of the UAW, the PRB noted that, during 1973, it had acted on 35 appeals, the highest number ever decided within a yearly period since its inception.

A total of 318 formal appeals has been filed with the PRB since its creation. The PRB has also been of inestimable value to additional hundreds of members by offering advice

and help on the numerous informal complaints and inquiries that are daily directed to its attention.

"This increased use of the PRB by our members is consistent with the times," said UAW Pres. Leonard Woodcock. "More importantly, it testifies to the awareness of our membership of the existence of the PRB and of its value."

Not Costly

The price of seeking justice in the UAW is not tied to the individual's pursestrings either. The various appeals procedures are generally processed within or near the locale of the appellant, whenever possible. During 1973, the PRB reported expenses of $98,806.53.

In presenting the report to the UAW's 24th Constitutional Convention, the PRB chairman, Msgr. George C. Higgins, secretary for research for the U.S. Catholic Conference, remarked that the creation of the PRB "was an extraordinary innovation, so extraordinary that even to this day few, if any, other institutions in American life are even considering going that route . . . We have never had anything but the most complete and honest and above-board cooperation from all of your officers and local union officials."

In serving as one of the supreme appellate tribunals of the UAW, the PRB has authority equal to that of the Constitutional Convention Appeals Committee (CAC), except in the area of collective bargaining appeals. However, the PRB, composed of seven distinguished, impartial, independent individuals completely outside the employ or influence of the UAW, is in daily operation. The CAC meets every six months. It is a body of 18 UAW members representing each region, nine of whom are selected by lot at each convention.

The members of the PRB serve on a convention-to-convention basis and are authorized to rule on any decision or dispute arising within the union as set forth under Article 33, Section 8 of the International UAW Constitution.

"Almost unique"

"The UAW is almost unique — not only in the labor movement but in all American life," said Msgr. Higgins, ". . . in voluntarily, on its own initiative, setting up this kind of Public Review Board and handing over to seven outsiders . . . the authority to make binding decisions on charges brought by you, the members, against your locals, or your regional groups, or your International, of violations of your Constitution."

Commented Woodcock: "Not only has our union accepted the concept of public review, we have also commended it to others.

"We are . . . proud to have pioneered in the concept of public review. We continue to be deeply grateful to the men and women of the board who give so unselfishly of their time to assist our union in achieving its goal of 'a more perfect union'."

PRB members

Presently comprising the panel of "impartial persons of good public repute" who serve on the PRB, in addition to Msgr. Higgins, are: Prof. Harry W. Arthurs, dean of the Osgoode Hall Law School at York University in Toronto, Canada; Prof. James E. Jones Jr., director of the Industrial Relations Research Institute at the University of Wisconsin; the Hon. Frank W. McCulloch of the University of Virginia Law School; Dr. Jean T. McKelvey, professor at the New York State School of Industrial and Labor Relations of Cornell University; Dean Theodore J. St. Antoine, Law school

dean at the University of Michigan, and Rabbi Jacob J. Weinstein, rabbi emeritus of K.A.M. Isaiah Israel Congregation in San Francisco, Calif. Attorney David Y. Klein is executive director of the PRB.

The PRB's staff and facilities are available to UAW members by letter, telephone or personal visit to the board headquarters: 23725 Northwestern Highway, Southfield, Mich. 48075; Telephone 313/354-5558.

The CAC

How Convention Appeals Committee works

In its recent report to the 24th Constitutional Convention, the Convention Appeals Committee (CAC) noted that it had acted on 11 cases "involving a variety of claims and challenges."

The CAC, like the Public Review Board, has full jurisdiction over matters submitted to it. However, the PRB is limited in its review of any official collective bargaining grievances of the International Union unless fraud, discrimination or collusion is alleged in the appeal.

The CAC, which meets at six-month intervals, is a peer group of 18 UAW members, one from each region. To provide continuity, half the group is selected by lot at each convention from the delegates attending each regional election. Each serves for two convention terms. Two alternates to each member are elected at the same time.

The members who served on the CAC during the past term and participated in the hearings which were reported to the 1974 Convention were: Chairman, Aaron B. Johnson — Region 1D; secretary, Roxie Elardo — Region 2; Chester Peuterbaugh — Region 1; Robert Battle III — Region 1A; Norman Scaglione — Region 1B; Kenneth Johnson — Region 1C; Steve Protulis — Region 1E; Don Millennor —

Region 2A; Mary Lou Campbell, Ray Futrell, alternate — Region 2B; John Yentes — Regions 3; Joe Wahl — Region 4; Henry C. Hall — Region 5; Jesse Corbertt — Region 6; Gary Lilley — Canadian Region; Gene A. Brown — Region 8; John T. Farcas — Region 9; Calvin J. LaPierre, Paul Amenta, alternate — Region 9A; Michael T. Devine — Region 10.

New members

At the June convention, nine regions selected the following members and alternates to serve for the next two terms on the CAC with the holdover members from the nine other regions:

Region 1 — Mae Baumann and alternates, Joe Vassalo, Corsie Childers;

Region 1A — Nelson Hill, Macon Bomar, Dorothy E. Jones;

Region 1B — Bruce Grimes, Jerry Sudderth, John Batsko Jr.;

Region 1D — Ted M. Scoggins, Howard Miller, James E. Jackson;

Region 2A — John Revella, Sam Allmond, Tony Placenti;

Region 5 — Charles Jarvis, E. W. Adkins, Harold Bahrenburg;

Region 9 — James J. Wood, Marvin Washington, Francis DeAnthony;

Region 9A — Gerald Dankulich, Thomas F. Curtin, Robert M. Kushnier;

Region 10 — Edward Merten, William F. Brunton, William Herzog.

In order to provide additional appeals procedures for aggrieved members, the UAW Constitution also provides that

the president, at his discretion, may decide an appeal rather than submit it to an Appeals Committee.

The International Executive Board may act upon an appeal when a local membership or delegate body fails to meet or act upon an appeal within 45 days of submission. In each of these instances, however, the action still may be appealed further to either the CAC or to the PRB, but not to both. Decisions rendered by the PRB and CAC are final.

The UAW Constitution's internal remedies provisions cover virtually any claim arising from the day-to-day operations of the union. An initial appeal is made to the general membership of the local (or unit). If unsatisfied, the member may submit a written appeal within 30 days to the IEB in care of the International president.

A written decision of the IEB or the UAW president may then be appealed further to the CAC or PRB, if the member still is unsatisfied.

Joint Trial Exhibit F-1
— Decision of Public Review Board —
— No. 13 —

The Public Review Board, International Union, UAW.

Appeal of: Local 469 (Master Lock Co., Milwaukee), In Re Agatha Praniewicz, Pub. Rev. Bd. Case No. 13

DECISION OF THE BOARD

(Issued May 23, 1958)

PANEL SITTING: Adler, Chairman; Hanrahan and McCree, Members

A hearing was held in this matter on February 12, 1958, in Milwaukee, Wisconsin, before a hearing examiner appointed for the purpose by the Public Review Board. Evidence and arguments were presented at that time by Local 469, Agatha Praniewicz, and the International Union, represented respectively by Gollmar Svenson, Local President, A. A. Hindin, attorney at law, and Raymond Berndt, Regional Director, Region 3. At the conclusion of the hearing, all parties waived further argument, oral or written, before the Public Review Board. Accordingly, the Board has considered this case, through a panel constituted in accordance with Article 31, Section 5, on the basis of the record made at the said hearing and the prior record resulting from the actions of the Union tribunals in the matter.

Nature of the Appeal

This case is before the Public Review Board on the appeal of Local 469 from a decision of the International Executive Board rendered March 7, 1957. The latter decision, in substance, directed the Local to pay Agatha Praniewicz the sum of $800, this being found to be the total wages lost by her between the date of her discharge by the Master Lock Company, whose employees are represented by Local 469, and

her obtaining of other work. The basis for the award was a finding that the discharge was prompted, at least in substantial part, by the Local itself as a result of complaints made against Mrs. Praniewicz by some of her fellow workers, and that in connection with these complaints Mrs. Praniewicz was not afforded the protection to which she was entitled under certain provisions of the International Constitution.

The Local contested this decision on the merits and, as the result of a show cause hearing before the International Executive Board on October 9 as to why it had not complied with the March 7 order, was granted the right of delayed appeal to the Public Review Board under Article 32, Section 9.[1] This right of delayed appeal was conditioned on the Local's first complying with the March 7 decision of the International Executive Board, as required by Article 32, Section 1,[2] by paying the $800 into escrow. That amount has been paid over to Regional Director Harvey Kitzman, Region 10, for disposition in accordance with the decision of the Public Review Board on this appeal.

It is thus apparent that the question of what relief the Public Review Board could itself require of the Local Union under the facts is not presented in this case. Nor is the question of the International Executive Board's power to require the payment of damages by a Local to one of its members. As the Public Review Board views the record, the parties have in effect stipulated to the relief to be granted in the event of a decision against the Local; the sole question before the Board, therefore, is whether the decision should go for or against Local 469.

Statement of Facts

Agatha Praniewicz was laid off by the Master Lock Company along with other employees in mid-January of 1954. On March 1, 1954, after the Company had started recalling

some of the employees, Mrs. Praniewicz testified that she telephoned the employment office to inquire when she would be recalled and was informed by the Personnel Manager that her recall was being held up at the request of officers of Local 469 because of a number of grievances filed with the Union by women with whom she worked. On March 2, 1954, the Executive Board of Local 469 held a meeting at which Mrs. Praniewicz was invited to be, and was, present. Statements signed by seven fellow workers to the effect that her loud, abusive talk was a disturbing influence in the department were shown to her by the Local President, Gollmar Svenson. She was asked whether she had anything to say with respect to them and responded by demanding a trial in accordance with the International Constitution.

On March 3, 1954, Kenneth Blockwitz, Recording Secretary of Local 469, speaking for the Local Executive Board, answered Mrs. Praniewicz' demand in the following letter:

"Dear Mrs. Praniewicz:

"This letter is to inform you of the outcome of Grievance #B 84577, filed against you by several of your fellow employees.

"The Executive Board of Local #469 wishes to inform you that after due consideration of all the facts presented it has been decided against you. After meeting with you on Tuesday, March 2, 1954, a vote was taken and a unanimous decision was reached by all of the Executive Board.

"This decision was based upon the fact that after the charges against you were presented to you, you neither denied nor refuted any of them when you were given the chance, therefore it was assumed that they were true.

"A meeting with Management was held on March 3, 1954 when our decision was passed on to them, and your name has been dropped from the Seniority List of the Master Lock Company.

"Since the decision reached went against you, we have no alternative except to send you a withdrawal card from our Local."

In a letter dated March 8, 1954, the Personnel Manager of the Master Lock Company wrote Mrs. Praniewicz as follows:

"Dear Mrs. Praniewicz:

"This is to notify you that you have been discharged and your employment with our company has been terminated, so that your name has been dropped from our seniority list.

"This action was taken because of your disloyalty and because of the number of grievances filed against you for misconduct while in our employ."

On March 12, 1954, Mrs. Praniewicz wrote to Recording Secretary Blockwitz, renewing her request that the Local "follow the procedure of the Constitution of the International Union, UAW-CIO — Article 48 [now Article 30], so that I can return to my job and have my seniority rights restored."

On March 18, 1954, Blockwitz answered the foregoing letter as follows:

"Dear Mrs. Praniewicz:

"In answer to your letter dated March 12, 1954, in regard to your discharge from the Master Lock Co., I wish to state that this matter is now out of our hands. The Grievance filed against you has been closed and our decision relayed to you.

"After having checked over the entire Article 48 of the International Constitution, and also having checked

with our International Representative, Mr. Frank Sahorske, we find that if you do not agree with this decision you have the right to make an appeal through the International Union."

Mrs. Praniewicz subsequently brought her case to the attention of the Women's Bureau of the Fair Practices and Anti-Discrimination Department of the International Union. The Women's Bureau investigated the matter and after consultation with the officers of Local 469 convinced them that the Local Union should negotiate with the Master Lock Company for appellant's reinstatement and back pay. Accordingly, at meetings on September 11 and November 10, 1954, the membership of Local 469 was led to reconsider the Praniewicz matter. It concluded, however, to reaffirm the original position of the Local, namely, that any further action must come from Mrs. Praniewicz. The position of the Local officers as a result of this decision of the membership was presented by Recording Secretary Blockwitz in a letter of September 22, 1954, to the Assistant Regional Director, Frank Sahorske. Reporting the aforesaid result of the September 11 membership meeting, Blockwitz wrote: "Since, we, the Executive Board, of any Union are only the mouthpiece of the entire union, we have no recourse except to maintain this position."

This effort via the Women's Bureau of the International Union having thus proved fruitless, the case was returned to the normal appeal procedures and a hearing held on January 3, 1957, before an Appeal Committee of the International Executive Board. (The delay between consideration by the Women's Bureau and this Appeal Committee hearing was apparently occasioned by the serious illness of International Vice-President Norman Matthews, who was the original chairman of the three-man Appeal Committee.)

The Appeal Committee's recommendation, after hearing, was as follows:

> "In light of the fact that Sister Praniewicz has advised the committee that she does not wish to return to employment at the Master Lock Company at this late date, the Appeals Committee recommends that the officers of Local 469, in conjunction with a representative of the Region 10 Office, meet with the management for the purpose of
>
> "(a) Obtaining a letter from the management which will completely nullify the letter sent to Sister Praniewicz on March 8, 1954.
>
> "(b) Obtaining a communication from management addressed to Sister Praniewicz which will indicate that she is a desirable employee and that the Master Lock Company would at any time in the future consider her application for re-employment.
>
> "(c) Negotiating with management for payment of $400.00 which would cover one-half of the monies lost by Sister Praniewicz.
>
> "Further that the Local Union, upon completion of these negotiations, pay to Sister Praniewicz $400.00 which represents the second half of monies lost by Sister Praniewicz, and should the Local Union fail to obtain monetary relief as suggested above for Sister Praniewicz by the company, the Local Union is hereby directed to pay the full amount of $800.00."

The foregoing recommendation of the Appeal Committee was adopted by the International Executive Board on March 7, 1957. Upon Local 469's failure to comply with this decision, the local officers were directed, pursuant to Article 12, Section 2,[3] to appear before the International Executive Board on October 9, 1957, to show cause why they had not complied. (The apparent sanction in the offing was the appointment of an administrator under Article 12, Section 2,

who would take over the assets of the Local long enough to pay the $800 to Mrs. Praniewicz, returning control thereafter to the Local officers.) In the course of the show cause hearing, President Reuther worked out an arrangement with the officers of Local 469 whereby the Local Union would be accorded the right to appeal the matter to the Public Review Board (its time for such appeal being extended by the International President under Article 32, Section 9) on condition that it first comply with the March 7 decision of the International Executive Board, as required by Article 32, Section 1, by paying the $800 into escrow.

Decision

In the view taken by the Public Review Board, the essential issue presented on this appeal is whether Agatha Praniewicz was accorded the procedural due process guaranteed to her as a member of the Union under the International Constitution. After careful consideration of the record, the Board is convinced that Mrs. Praniewicz was not accorded such Union due process.

She was denied the trial to which she was entitled under Article 48, Section 3[4] of the 1953 Constitution, then in effect: no trial committee was constituted as called for by Section 7;[5] she did not receive the notice of charges against her required in Section 4,[6] nor of time and place of hearing required in Section 8;[7] she was given no opportunity to confront her accusers, etc. Such "hearing" as she had was that conducted by the Local Union Executive Board on March 2, 1954, when they called her into a meeting on less than a day's notice without adequately apprising her of its purpose, presented her with a list of complaints made against her by certain fellow workers, then absent, and asked her what she had to say. Her specific requests for a trial in accordance with Article 48 (now Article 30) were ignored

on the ground that the Local officers had accorded her all the rights she was entitled to and that anything further she might desire in that regard would have to be achieved by her by way of appeal.

From the testimony of the officers of the Local appearing in the record, it seems amply clear that what was done was not motivated by malice but rather resulted from failure to comprehend the importance of adherence to the trial procedure prescribed in the International Constitution. The very purpose of the latter is to protect to the fullest the rights of an individual member against error that might more easily occur in a less formal type of hearing, such as that held by this Local on March 2, 1954. In seeking to explain and justify the procedure actually followed, the Local President drew a purported distinction in his testimony between "charges" against a Union member, which he conceded to be properly dealt with under the Article 48 procedure, and "grievances" against the member, which he insisted would not require such meticulous handling. While not intending to indicate an understanding of this distinction,[8] the Board is convinced that, whether under the label of "charges" or "grievances", the course taken by the Local deprived Mrs. Praniewicz of her right to a full and fair trial under Article 48.

The finding of the International Executive Board to the same effect is accordingly affirmed and this appeal decided in favor of Agatha Praniewicz.

The relief to be afforded Mrs. Praniewicz in the event of a decision in her favor has been stipulated by the parties, as aforesaid, an award of $800 being held in escrow by Regional Director Harvey Kitzman. Pursuant to that stipulation, the said sum is to be paid over to Mrs. Praniewicz upon receipt from her of an acknowledgement of satisfaction

of her claim against Local 469 growing out of her discharge by the Master Lock Company.

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FOOTNOTES

1. Article 32, Section 9 provides that the appellant "must take the appeal within thirty (30) days of notification of the International Executive Board's decision, (unless such time is extended by the International Union President, where, in his opinion, justice will be served by such an extention). . . ."

2. Article 32, Section 1: "All subordinate bodies of the International Union, and members thereof, shall be entitled to the right of appeal. In all cases, however, the decision of the lower tribunal must be complied with before the right to appeal can be accepted by the next tribunal in authority, and shall remain in effect until reversed or modified."

3. Article 12, Section 2: "The International Executive Board shall have power to revoke charters and to reorganize subordinate bodies in one of the two following manners:

***

> "(b) For violation of this Constitution or of the laws of this International Union, or in case of disputes within any subordinate body affecting the welfare of its membership or its existence, the International Executive Board may, by two-thirds (2/3) vote of the entire Executive Board, after a hearing, revoke the charter or suspend any officer or officers from office and take over supervision of the subordinate body until its affairs have been properly adjusted. . . ."

4. Article 48, Section 3 (1953 Constitution): "Upon charges being submitted, it is mandatory that a trial be held, unless the charges are withdrawn by the accuser."

5. Article 48, Section 7 (1953 Constitution): "The accused member shall be tried by a Trial Committee consisting of at least seven (7) members, and such additional members as may be chosen to act as alternates, who shall be elected by the Local Union, or, in the case of an Amalgamated Local Union, by the Shop Organization, at the next membership meeting, which shall be not later than forty-five (45) days from the time the charges were submitted. A Trial Committee shall be separately elected for the trial of each case."

6. Article 48, Section 4 (1953 Constitution): "A member against whom charges have been filed shall be notified of such charges by receipted registered mail within seven (7) days after the charges have been submitted to the Local Union. . . ."

7. Article 48, Section 8 (1953 Constitution): "Within seven (7) days after the Trial Committee has been elected, the accused member shall be notified of the time and place of the trial, which shall be held not less than fifteen (15) days nor more than thirty (30) days from the date of his receipt of such notification . . ."

8. The confusion of the Local officers is evidenced by the following excerpt from the Statement of Reasons for Appeal filed by them with the Public Review Board:

> "Did the Local Union act Properly under provisions of the 1954 [1953] Constitution in deciding a trial was unnecessary and not required where its Executive Board (9) members found that voluntary grievances filed by some of its members against one Union Member, for her acts of misconduct were true (and the Union membership several times approved such Executive Board action) and no formal charges asking for a trial were filed by anyone?
>
> "We maintain our Local #469 acted properly in 1954 since there were no charges filed on which to

have a 'trial' and our Executive Board reviewed and passed on the grievances, all Constitutional provisions then in effect were followed. It appears to us that the intent of Article 48 (now Article 30) of the Constitution in providing for a trial was for a charge against a member who violated the Constitution of the Union, or engaged in conduct harmful to the Union, and not for a 'trial' on every grievance for misconduct against fellow workers or the Company.''

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Joint Trial Exhibit F-2
— Decision of Public Review Board —
— No. 192 —

The Public Review Board, International Union, UAW.

Jim Pfeiffer, Plaintiff-Appellee, v. Local 556, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Defendant-Appellant. Case No. 192

DECISION

(Issued October 18, 1968)

PANEL SITTING: Rt. Rev. Msgr. George G. Higgins, Chairman; Professor Harry W. Arthurs, Dr. Henry Hitt Crane, Professor R. W. Fleming, Judge George N. Leighton, Dr. Jean T. McKelvey and Rabbi Jacob J. Weinstein, Members.

Local Union 556, Racine, Wisconsin, appeals a decision of the International Executive Board (IEB) holding that the Local improperly represented Jim Pfeiffer, one of its members, in the processing of his grievance. The IEB ordered the Local to reimburse the member in question for the loss of wages which he sustained as a result of the failure of the Local to process his grievance and the Local has undertaken compliance.[1] At the request of the Local Union, oral argument before a panel of the Board was heard on August 17, 1968, in Chicago, Illinois.

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[1]As of August 17, 1968, the Local had paid Mr. Pfeiffer $4,000.00 of the $4,897.00 which the International Executive Board concluded was owing him.

I.

Jim Pfeiffer, the aggrieved, is a former president of Local 556. On July 16, 1966, while serving his term as president, Pfeiffer was elected business agent of the Hotel and Restaurant Employees and Bartenders Union Local No. 322, a full-time, paid position. Pursuant to Section 705 of the Collective Bargaining Agreement,[2] he requested a leave of absence from the Jacobson Manufacturing Company, which request was granted.[3] His letter of request indicated no specific duration of the leave.

In May, 1967, Pfeiffer terminated his employment with the Hotel and Restaurant Employees Union and advised the Company that he desired to cancel his leave and return to work. This request was denied, the Company taking the position that Pfeiffer had been granted a leave of absence for two years and, therefore, he could not return until the

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[2]Section 705 of the Collective Bargaining Agreement provides:

"At the request of the Union, a leave of absence for a period of two (2) years shall be granted by the Company to any one (1) employee in any year elected to Union Office."

[3]The Company also had on file an unsigned Request for Leave of Absence form concerning Pfeiffer's request. In relevant part it reads as follows:

"I request a leave of absence for the period and reason indicated below:

Time off requested: from July 18, 1966, to July 18, 1968, inclusive.

Reason for request: to accept Union Office for a two-year period as specifically covered in 7.05, Employees to Union Offices, in the Current Labor-Management Agreement.

"I understand this leave, if granted, will be subject to the following conditions: My employment will terminate if I do not return to my job on xxxx the first work day after this week it expires. If an emergency prevents my return, I will immediately request a renewal of this leave. The Company may or may not grant such request, depending upon the facts."

The x'd portion reads: "or before" and, as previously observed, the request form is not signed.

end of this period. Pfeiffer grieved. The grievance was denied by the Company for the reason previously stated, whereupon Pfeiffer requested that the matter be submitted to arbitration. The Local Union consulted its attorney who, according to the Local Union, advised that there was, in his opinion, only a fifty-fifty chance of winning the claim.

The Local Executive Board on June 19 voted not to arbitrate the case. On June 23, Sam Rizzo, Sub-Regional Director, wrote Howard Greene, who was then president of Local 556, indicating that in his opinion the grievance warranted exhausting through the arbitration step. Rizzo concluded with a warning that should Pfeiffer appeal the disposition of this grievance, the Local Union should be able to show it had given "as much consideration and support of this grievance as it has to other grievances of a similar or less serious nature. . . ."

On June 29, 1967, the time for submission of the grievance to arbitration expired without the Local Union having taken any action. On July 3, 1967, the Local requested an extension of time for appealing to arbitration, which request was denied by the Company on July 5. On July 11, the Local Executive Board again voted not to take the grievance to arbitration. At the regular membership meeting also held on that date the membership voted not to take the matter to arbitration. Sub-Regional Director Rizzo advised Pfeiffer that arbitration could still be achieved through Pfeiffer filing a new grievance. The Local Union maintains that Pfeiffer declined to file a new grievance; Pfeiffer explains this by indicating that the membership's vote effectively "precluded me from renewing my request and filing a grievance, since the decision was already made that my grievance would be dropped prior to arbitration."

On August 6, 1967, Pfeiffer went to Rizzo and indicated he wished to charge the Local with failure of proper rep-

resentation. Pursuant to this suggestion, Pfeiffer, on August 10, 1967, wrote Regional Director Kitzman requesting that the matter be investigated. Rizzo met with the Executive Board on August 28, at which point the Local President, Greene, took the position that under Article 32, Sections 2 and 6, Pfeiffer's appeal was untimely. The case was processed to the International Executive Board, however, which on March 18, 1968, issued its decision holding that the failure of the Local to process Pfeiffer's grievance to arbitration was "a deliberate abrogation" of his rights. The Committee directed that the Local process a new grievance on his behalf and to make him whole for "all wages lost from May, 1967, until his date of return to work, less any period of time Jim Pfeiffer was sick, less any compensation he might have received in this period. . . ." Local 556 has timely appealed to the Public Review Board.

II.

Local 556's position is as follows:

1. The appeal to the IEB was untimely.
2. Pfeiffer failed to pay his dues from December, 1966, through June 5, 1967, at which point he paid a reinstatement fee and dues in the amount of $51.00. This fact, the Local Union claims, gave it the impression "we were not wanted or needed until he wanted to come back to work."
3. The case was not clearly one which could be won, the Local attorney having indicated that in his opinion there was only a fifty-fifty chance of winning it.
4. Pfeiffer, when president, did not advise the Local Executive Board of his intention to request a leave of absence nor did he actually submit his resignation until January 24, 1967.

5. Pfeiffer never did appeal to the Local Union as per Article 32, Section 2.

The International Union in its answer filed July 2, 1968, takes the position the appeal is one over which the PRB has no jurisdiction, there being no claim, or evidence to support a claim, of fraud, discrimination or collusion with management. Alternatively, it argues that under the facts of this case the Local Union's refusal to process this grievance to arbitration despite the admonitions of the Regional office was indefensible and the Local, having chosen this course, must now make Pfeiffer whole for the loss which it occasioned him.

III.

At the time appellant's request for oral argument was granted, we advised the parties we were withholding judgment as to our jurisdiction over the subject matter of the appeal. We now conclude this appeal is one over which the Public Review Board has been vested with jurisdiction under the Constitution.

Public Review Board jurisdiction over appeals involving the processing of collective bargaining grievances is limited by the Constitution to those cases "in which the appellant has alleged before the administrative arm or the International Executive Board that the grievance was improperly handled because of fraud; discrimination or collusion with management."[4] This provision, the International Union asserts, ousts the PRB of jurisdiction since no allegations of fraud, discrimination or collusion are present in the record, nor is there any independent evidence which would sustain such a position. We think this position will not stand close scrutiny.

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[4]Article 32, Section 9(b) of the Constitution.

It is clear that a local union will not have alleged before the IEB that a grievance was disposed for reasons which were fraudulent, collusive or discriminatory. therefore, the word appellant in Section 9(b) refers only to the situation in which the aggrieved member is the appellant.[5]

Since Article 32, Section 9(b) is not relevant, jurisdiction may be found under Article 32, Section 9(c) providing the Public Review Board with authority to review ". . . any other case in which the International Executive Board has passed upon an appeal from the action of a subordinate body."

Without announcing the basis for its conclusion, the IEB held that the failure on the part of Local 556 to process this grievance to arbitration was "a deliberate abrogation" of Pfeiffer's rights and it therefore ordered the Local Union to make him financially whole. We would hope that the IEB will in the future provide greater illumination. The failure of the International Executive Board to explain its decision is unfortunate for, deprived of its reasoning, we are left to speculate with respect to certain of the issues

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[5]We have considered the possiblity that the word "appellant" as used in Section 9(b) refers to the status of parties at the time the matter was before the IEB. While we think this may have been the intent of the drafters of the Section, such a holding would be strained indeed in light of the language immediately preceding sub-paragraph (b) wherein the reference to the party appellant clearly identifies him as the party appealing to the Public Review Board:

Article 32, Section 9:

> "Any subordinate body or member thereof wishing to appeal from any decision of the International Executive Board or an International Trial Committee may, in all cases, take such appeal to the Constitutional Convention of the International Union. The appellant shall, however, have the alternative of appealing such decision of the International Executive Board or an International Trial Committee to the Public Review Board established in Article 31 of this Constitution in the following cases:"

which in this instance may have been crucial to the resolution of the issue of our jurisdiction.

Grievance processing necessarily involves resolution of questions of policy which are best left to those in whom the Union's membership has entrusted the responsibility for making these judgments. Nevertheless, we think it is our duty to review the record to determine whether there is a basis in the evidence to support the IEB's holding. If there is such evidence, we are obliged to affirm that holding.[6]

It is undisputed that Pfeiffer's request for a leave of absence was granted by his employer. It is likewise undisputed that his letter of request specified no definite period. The application form with the words "or before" x'd out was not signed by Pfeiffer and, therefore, it would be reasonable to assume could not be ascribed to him. Furthermore, the fact that the form itself provided for return "on or before" the expiration date of the leave negates the argument that all leaves of absence must be for two years' duration and no less. Therefore, we conclude there is ample evidence to support the International Union's judgment that the case should have been taken to arbitration.

We recognize, of course, that the submission of a claim to arbitration involves a substantial commitment of the human and economic resources of a local union. A legitimate judgment not to arbitrate some grievances can be made

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[6]We emphasize, however, that we shall defer only to factual findings and policy conclusions. Moreover, deference shall be sparingly exercised with respect to factual findings when they concern issues of whether fraud, collusion or discrimination affected the disposition of a grievance. Finally, since this case is atypical in the posture in which it is presented, it should not be thought that our approach to its determination signals any change in our formerly stated positions respecting review of grievance appeals or that this judgment constitutes a definitive statement as to the duty of the Union in processing collective bargaining grievances.

simply because the exigencies of the situation do not require it when balanced against the expenditures. But when contract violations result in serious personal harm to an employee or group of employees, then the lack of merit in the cause should be clear before the claim is dropped. Here the Union was willing to abandon Pfeiffer's job rights for one year even though, in the opinion of its legal counsel, it had a fifty-fifty chance of winning. There are few cases in which victory is a certainty; under the circumstances, the odds here dictated pursuance of the claim. As stated by one of the representatives of the International Union during the course of oral argument before this panel, the representation of employees is the *sine qua non* for existence of a union — when it ceases to fulfill this function its reason for existence also ceases.

We can quickly dispose of the remainder of the grounds asserted by Local 556 in support of its appeal. There is no merit to its claim the appeal was untimely. While the Local membership voted not to arbitrate the grievance on July 11, 1967, and Pfeiffer did not formally appeal until September 15, or more than thirty days permitted under the Constitution, he made various attempts throughout this period to adjust the matter with the aid of the Regional office. For example, an Executive Board meeting was requested August 10 and held August 28, where the Board again refused to seek arbitration of the grievance. Pfeiffer did not, therefore, simply neglect his case for sixty-five days but he worked actively to achieve his end and there is no evidence that the Local has been prejudiced in any way as a result in the delay of the formal application for appeal.

The fact that Pfeiffer may have been delinquent in his dues is of no relevance. Local 556 does not represent merely its members; rather it is charged under the law with representing all employees in the Bargaining Unit regardless

of membership or non-membership in the Union. While it might have lawfully been able to bring about Pfeiffer's discharge for dues delinquency, it did not do so.[7] Pfeiffer was, therefore, still an employee and the Union was obliged to represent him fairly and honestly.

Finally, it is simply factually inaccurate to state Pfeiffer did not submit his appeal to the Local membership. The matter was appealed to the Local membership July 11, 1967, at which time the membership voted not to process it.

There is no showing that the fact that Pfeiffer may have been tardy in submitting his resignation in any way prejudiced the Union, nor is there any indication of the relevance of this claim to the issues presented.

The consequence of the Company's refusal to allow Pfeiffer to return was the loss of his right to work for one year — a right guaranteed him by his seniority. This was a serious loss indeed and we, therefore, conclude there was a sufficient basis in the facts to sustain the IEB's conclusion that Pfeiffer's grievance should have been arbitrated.

Affirmed.

# # #

CONCURRENCE

Professor Harry W. Arthurs concurring —

I concur in the result reached herein and most of the reasoning expressed in support of the conclusion. However,

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[7]Under the provisions of Article 17, Section 2, it would seem, however, that Pfeiffer should have been issued a withdrawal card by his Local in which case he would not have been a delinquent:

> . . . "Any member laid off from his plant but regularly employed an honorable withdrawal transfer card, or in order to maintain himself in good standing in his Local Union, shall pay dues in accordance with Article 16 and Article 46.
>
> Any member who has voluntarily separated himself from the jurisdiction of the UAW shall be issued a withdrawal card immediately by his Local Union. The above shall not apply to those members who are employed by or officially represent the UAW, National AFL-CIO or AFL-CIO State, County or City Councils."

I regard the result which was reached as having been dictated by the particular facts of this appeal and should not be regarded as a definition in any conclusive way of the nature of the obligation to process grievances. The task of defining the obligation of the Union in processing the grievances of its members shall continue to be developed in light of the circumstances of each appeal.

Joint Trial Exhibit J
— Affidavit of Richard Krolewski —

In the United States District Court, Central District of California.

Clifford E. Clayton, Plaintiff, v. I.T.T. Gilfillan, a Division of International Telephone & Telegraph Corporation, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and its Local 509, Defendants. No. 76-0730-IH.

AFFIDAVIT OF RICHARD KROLEWSKI

With Attached and Incorporated UAW Exhibit 12

STATE OF MICHIGAN)
)ss.
COUNTY OF WAYNE)

Being first duly sworn, Richard Krolewski says and deposes as follows:

My name is Richard Krolewski. My office address is 8731 East Jefferson Avenue, Detroit, Michigan 48214. I make this affidavit of my own personal knowledge.

I am employed by the International Union, UAW, as the Assistant Director of the Information Systems Department. In that capacity, I am directly responsible for the management, maintenance and programming of the UAW's computer facilities.

These computer facilities, among other things, are used to maintain the UAW's membership and mailing lists. The computer supplies mailing labels used, among other things, to mail the regular issues of Solidarity to the membership. I have examined the computer files, and other business records under my control, to determine whether Clifford

Clayton of Local 509 is on that mailing list, and, if so, how long and at what address.

These records show that this individual is on the Solidarity mailing list, and has been mailed Solidarity regularly at the following address:

Clifford Clayton
1852 W. 76th St.
Los Angeles, CA. 90047

The attached computer print-out, incorporated by this reference as UAW Exhibit 12, shows this to be the case. It also establishes that this individual has been listed at this address since at least August 1974, and probably for a substantial period before that date.

Further Affiant sayeth not.

s/s RICHARD KROLEWSKI,
Richard Krolewski

Subscribed and sworn to before me
this 2nd day of March, 1977.

/s/ ELIZABETH PILOT
Elizabeth Pilot
Notary Public, Wayne County, Michigan
My Commission Expires September 17, 1980

2/18/77 (FRIDAY) CIRCULATION FILE RECORDS 16:23 PAGE 1

2/ 0007=5=3835 *** SPO INPUT ***

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* * * *

* U77B	U77B
*A6 0509200075383S 58	A6 0509200075383G 50
*CLIFFORD CLAYTON	DERRICK CLAYTON
*1852 W 76TH ST	1714 W FLORENCE
*LOS ANGELES CA 90047	LOS ANGELES CA 90047

Sample of Mailing Label.

JUDGMENT

United States District Court, Central District of California.

Clifford E. Clayton, Plaintiff, vs. ITT GILFILLAN, A Division of International Telephone and Telegraph Corporation, a Corporation; INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, an unincorporated labor organization; UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL UNION NO. 509, an unincorporated labor organization, Defendants. Civil No. 76-0730-IH

Filed: May 27, 1977.

The above-entitled matter having come on for trial before this Court on May 3, 4, and 5, 1977, Plaintiff CLIFFORD E. CLAYTON, being Represented by John McTernan of Margolis, McTernan, Scope and Sacks, Defendant Unions' being represented by Matthew B.F. Biren and Lawrence Rosenzweig of Levy, Koszdin, Goldschmid and Sroloff, Defendant ITT Gilfillan being represented by Everett F. Meiners and Kenneth J. Florence of Parker, Milliken, Clark and O'Hara, and the Court having considered all the testimony and documentary exhibits, as well as oral argument, and having made Findings of Fact and Conclusions of Law.

IT IS HEREBY ADJUDGED AND DECREED that judgment shall be entered in favor of Defendant UNITED AU-

TOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW and its affiliated LOCAL 509 and Defendant ITT GILFILLAN and Defendants shall be awarded costs of suit.

DATED: May 27, 1977

/s/ Irving Hill
United States District Judge.

(Certificate of Proof of Service omitted in printing)

NOTICE OF APPEAL

United States District Court, Central District of California.

Clifford E. Clayton, Plaintiff, vs. ITT-Gilfillan, etc., et al., Defendants. Civil No. 76-0730-IH.

Notice is hereby given that Clifford Clayton, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 31st day of May, 1977.

The parties to this judgment, in addition to Clifford Clayton, plaintiff, and their respective attorneys of record are:

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America
United Automobile, Aerospace and Agricultural Implement Workers of America, Local Union No. 509
By: Levy, Koszdin, Goldschmid & Sroloff
3550 Wilshire Boulevard, Ste. 1020
Los Angeles, California 90010

ITT-Gilfillan, a Division of International Telephone and Telegraph Corporation
By: Parker, Milliken, Kohlmeyer, Clark & O'Hara
Security Pacific Plaza, 27th Floor
333 So. Hope Street
Los Angeles, California 90071

Dated: June 24, 1977.

Margolis, McTernan, Scope, Sacks & Epstein,
By JOHN T. McTERNAN,
John T. McTernan
3600 Wilshire Boulevard, #2200
Los Angeles, California 90010
Attorneys for Clifford Clayton, Plaintiff

JUDGMENT

United States Court of Appeals, for the Ninth Circuit

Clifford E. Clayton, Plaintiff-Appellee, Cross Appellant, vs. ITT Gilfillan, etc., et al., Defendants-Appellants, Cross-Appellees. No. 77-2756, 77-2763, DC# 76-0730 IH.

Filed and entered April 14, 1980.

APPEAL from the United States District Court for the Central District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is Reversed and Remanded for trial on the claim against the employer only. The judgment dismissing the claim against the union is Affirmed.

Supreme Court, U. S.
FILED
AUG 11 1980
MICHAEL RODAK, JR., CLERK

Nos. 80-54 & 80-5049

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CLIFFORD E. CLAYTON,
Petitioner & Cross-Respondent,

v.

ITT GILFILLAN,
Respondent & Cross-Petitioner,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) and its LOCAL 509,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION FOR UAW & its LOCAL 509

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Does a discharged employee's failure to exhaust his internal union remedies, found at trial to be full, fair and adequate, bar his fair representation action against the UAW?

2. A discharged employee's grievance is withdrawn from the contractual procedure, short of arbitration, by low-level union officials. The employee does not attempt his internal union remedies, which are full, fair and adequate. However, had he done so, the employer, even without admission of liability, would still have been *unwilling* to return the grievance to the contractual procedure, had an internal union appeal resulted in reversal of the union officials. Is such an employer, in a subsequent contract action by the employee, entitled to rely on the defense of failure to exhaust internal union remedies?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

Nos. 80-54 & 80-5049

CLIFFORD E. CLAYTON,
Petitioner & Cross-Respondent,

v.

ITT GILFILLAN,
Respondent & Cross-Petitioner,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) and its LOCAL 509,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION FOR UAW & its LOCAL 509

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and its Local 509,[1] by counsel, respectfully pray that the Court *deny* both the Petition, and the Cross-Petition for Writ of *Certiorari.*

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[1] Hereafter, jointly referred to as the "UAW" or "Union."

OPINIONS BELOW

The opinions below are reported at: *Clayton* v. *ITT Gilfillan, UAW & Local 509*, —— F. 2d —— (9th Cir. 1980), 104 LRRM 2118, 88 CCH Lab. Cas. ¶ 12,009, *amending* —— F. 2d —— (9th Cir. 1979), 102 LRRM 2190, 87 CCH Lab. Cas. ¶ 11,454.[2] As amended, the Circuit Court's opinion reversed in part, and affirmed in part, the unreported decision of the District Court, which entered judgment in favor of defendants ITT Gilfillan and UAW.[3]

COUNTERSTATEMENT OF THE CASE

Clayton was discharged by ITT Gilfillan, in 1975, for violation of a rule against lewd, indecent and immoral behavior in the plant.[4] Local and Regional UAW officials grieved the discharge, but withdrew the grievance short of arbitration, and notified Clayton.[5]

Article 33 of the UAW CONSTITUTION provides a procedure for successive review of such a decision, first by the Local membership, next by the International Executive Board (I.E.B.),[6] and finally by the Convention Appeals Committee (C.A.C.), or, in most types of cases, the Public Review Board (P.R.B.), at appellant's option.[7] The P.R.B. is a body of independent persons, unconnected with the UAW.[8] *See: Baldini* v. *UAW Local 1095*, 581 F.2d 145, 149 (7th Cir. 1978); *Winter* v. *IBT Local 639*, 569 F.2d 146, 151 n. 26 (D.C. Cir.

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[2] *Reprinted* in Appendix to ITT Gilfillan's Petition, hereafter "ITT App."

[3] *Id.*

[4] District Court's Findings of Fact & Conclusions of Law, ¶ 5, ITT App. at 4.

[5] *ibid.*, ¶ 6, ITT App. at 4-5.

[6] Exh. B at 62-66, *reprinted at* R. 240-78.

[7] Exh. B at 58-61, *reprinted at* R. 238-9.

[8] Exh. B at 66, *reprinted at* R. 242.

1977). The C.A.C. is more analogous to a *petit* jury with appellate duties, as it is composed of elected Delegates from the last UAW Convention, chosen by lot.

Article 33 § 12 of the UAW CONSTITUTION requires exhaustion.[9] Clayton stipulated that he did not invoke his remedies under the UAW CONSTITUTION, much less exhaust them.[10] Instead, he sued ITT Gilfillan for breach of contract, and the UAW for breach of the duty of fair representation.[11]

The District Court tried the question of exhaustion of remedies. It found, as a matter of fact, that the remedies were full, fair, adequate, and available to Clayton. It also found that Clayton had been specifically advised of their existence, and had participated in appeals brought by others.[12] No evidence of futility was presented.[13] Judgment was entered in favor of both the UAW and ITT Gilfillan, because Clayton failed to exhaust.[14]

On appeal, the Ninth Circuit's amended opinion affirmed as to the UAW, but reversed as to ITT Gilfillan, holding that, where the employer is unwilling to let an internal union appeal result in the reinstatement of the grievance into the contractual procedure, it cannot use this defense. Instead, it must defend the contract action on its merits.[15]

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[9] The I.E.B. is analogous to the Board of Directors of a corporation.

[10] Findings of Fact & Conclusions of Law, ¶ 7, ITT App. at 5.

[11] *See*: First Amended Complaint, at R. 33.

[12] *ibid.*, ¶'s 8-13, ITT App. at 6-11.

[13] *ibid.*, ¶ 14, ITT App. at 11.

[14] *ibid.*, ¶ 8, ITT App. at 16.

[15] Revised Opinion, hereafter "Rev. Op.", *reprinted at* ITT App. 11-27.

SUMMARY OF ARGUMENT

Certiorari should be denied. There is uniform agreement that an employee must exhaust remedies available under his union constitution, absent futility or inadequacy, before burdening the courts with a fair representation suit.

Likewise, the Circuit's uniform approach is to allow the employer this defense if it is willing to allow the grievance to be reinstated in the grievance and arbitration procedure, without admission of liability, should the internal union review reverse the original decision to withdraw it. In other cases, as here, where the employer is not so willing, the Circuits deny the defense, having the employer, as he prefers, defend the merits of the contract claim.

As to both these issues, the Circuits are not split, nor is there confusion on a significant statutory issue. At most, there is the normal variety of emphasis and language expected in a notoriously "fact specific" area.

ARGUMENT

Thanks to this Court's earlier decisions, the doctrinal underpinnings of the duty of fair representation are not the source of any particular controversy among the Circuits. This is true, as well, of the requirement that the grievant exhaust available internal union remedies. *See, e.g., Baldini* v. *UAW Local 1095*, 581 F. 2d 145 (7th Cir. 1978); *Winter* v. *IBT Local 639*, 569 F. 2d 146, 148 (D.C. Cir. 1977); *Imel* v. *Zohn*, 481 F. 2d 181, 183-4 (10th Cir. 1973); *Rainey* v. *Mo. Utilities Co.*, 596 F.2d 310 (8th Cir. 1979); *Ruzicka* v. *GMC*, 523 F. 2d 306, 311-12 (6th Cir. 1975). The District Courts have discretion to excuse the requirement in appropriate circumstances. *See, e.g., Chambers* v. *IBT Local 839*, 578 F. 2d 375 (8th Cir. 1978).

As to the union, federal courts have required that the remedy be adequate to redress the employee's complaint *against the union*, whether or not a solution to the employee's problems with the employer is possible. This is, of course, the only relief that could be granted against the union in judicial proceedings. Thus, a union cannot be ordered to reemploy the greivant, because, quite simply, it is not the employer. *Baldini, supra*, at 581.

Exhaustion is excused where the employee shows clear futility. Generally, this means that the procedures are obviously unfair, that the internal tribunals are specifically hostile or biased, and so there is no real chance of prevailing on the merits. *Varra* v. *Dillon Co.*, 615 F. 2d 1315 (10th Cir. 1980); *Fristoe* v. *Reynolds Metals Co.*, 615 F. 2d 1209 (9th Cir. 1980); *Chambers, supra; Winter, supra.* A narrow approach to futility is necessary to avoid the exception swallowing the rule, since, to prevail, a fair representation plaintiff must always show arbitrary, hostile, discriminatory, or bad faith conduct by the union. *Vaca* v. *Sipes*, 386 U.S. 171, (1967).

Most fair representation cases involve discharged employees whose grievance is withdrawn from the contractual procedure, by the union, short of arbitration. *Vaca* v. *Sipes, supra.* In such cases, many unions provide some form of internal review of the decision. However, review may not be available for other sorts of dispute. *See: Winter* v. *IBT Local 639*, 569 F. 2d 146, 150-1, *esp.* n. 26 (D.C. Cir. 1977), contrasting the UAW and IBT systems.[16] The form, the areas covered, and the extent of the review varies enormously, depending, as it does,

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[16] The IBT CONSTITUTION, *e.g.*, appears to exclude collective bargaining matters, *Chambers* v. *IBT Local 639*, 578 F. 2d 375 (D.C. Cir. 1978), while including greivance disputes, *Fizer* v. *Safeway Stores*, 586 F. 2d 182 (10th Cir. 1978).

on each union's internal rules and their application. In short, it is no surprise that appellate decisions have tended to be "fact specific" and, for that reason, sometimes confusing.

The approach of the Circuits, however, is uniform, even though the fruition may, on occasion, fall short. There is agreement that the employer lacks standing to assert the union constitution as a contract. *Fizer* v. *Safeway Stores*, 586 F. 2d 182 (10th Cir. 1978); *Keppard* v. *Int'l Harvester*, 581 F. 2d 764; *Winter* v. *IBT Local 639*, 569 F. 2d 146, 150 (D.C. Cir. 1978); *Petersen* v. *Roth Packing Co.*, 461 F. 2d 312, 315 (8th Cir. 1972); *Retana* v. *Apt. Operators Local 14*, 453 F. 2d 1018, 1027 n. 26 (9th Cir. 1972).

No Circuit has refused the employer the defense where it was established that, if the internal appeal reversed the union's decision, reinstitution of the grievance against the Company was possible. *See, e.g., Winter, supra; Harrison* v. *Chrysler Corp.*, 558 F. 2d 1273 (7th Cir. 1977). So the employer like General Motors Corp., Ford, or Chrysler would have the defense because, under the current contract with the UAW, a grievance may be reinstated in the contractual procedure if the employee's internal union appeal succeeds. Here ITT Gilfillan had not agreed to such a provision. It could always have allowed the same result *ad hoc*, case by case, rather than face trial of Clayton's contract claim; but for its own reasons, chose not to.[17] Where an employer has agreed, or is otherwise willing, to allow the grievance to re-enter the procedure, as the result of an internal union appeal, that internal review arguably becomes a sub-part of the con-

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[17] Such an *ad hoc* agreement as to Clayton would not require any admission of liability. The arbitrartor would still have to decide that issue. It would also quickly short-circuit any danger of "collusive" litigation. Indeed, it would avoid litigation entirely, to the easing of the burden on the federal judicial system.

tractual grievance procedure. In that situation, the employer's right to the defense can be justified under *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965). Such an employer's standing as to the defense is quite different from that of an employer, like ITT Gilfillan, with no intention of allowing reinstitution of the grievance. Where the employer refuses the *possibility* of that reinstitution, the Circuits do not allow employer use of the defense. This is understandable, since the employer's choice is litigation over arbitration. It is *not* unreasonable that one who chooses litigation should be required to litigate the merits of the contract issues without further procedural fencing.

Decisions denying the defense to the union, because of inadequacy or futility, and therefore also to the employer, are not at odds with the result below. Nor is it of any great consequence that, on occasion, a Circuit will allow the defense to an employer, without elucidation, in the process of affirming a summary judgment in favor of the union. Such memorandum results evince only sloppy advocacy and an overburdened judiciary, not any reasoned line of cases. *See, e.g.*, the Third Circuit's line: *Dezura* v. *Firestone Tire & Rubber Co.*, 470 F. Supp. 121 (E.D. Pa. 1979), *aff'd mem.* 612 F. 2d 571 (3d Cir. 1979); *Pawlak* v. *IBT*, 444 F. Supp. 807 (M.D. Pa. 1977), *aff'd mem.*, 571 F. 2d 572 (3d Cir. 1978); and *Aldridge* v. *Ludwig-Harold Mfg. Co.*, 385 F. Supp. 695 (E.D. Pa. 1974), *aff'd mem.* 517 F. 2d 1397 (3d Cir. 1975), *cert. denied*, 423 U.S. 937 (1975).[18] The Third Circuit's only

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[18] Perhaps the strangest two cases are *Willetts* v. *Ford Motor Co.*, 583 F. 2d 852 (6th Cir. 1978) and *Geddes* v. *Chrysler Corp.*, 608 F. 2d 261 (6th Cir. 1979), decided by identical panels. *Willetts* was a routine discharge case, where the Court held, without discussion, that Ford could use the defense. This was before the UAW-Ford Agreement allowed reinstatement of the grievance as a result of an internal union appeal. *Geddes* involved a transfer and merger of

considered option holds that the employer may not have the defense. *Brady* v. *T.W.A.*, 401 F. 2d 87 (3rd Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969).[19] The allegedly conflicting cases are simply different factual application of the same overall approach.[20] The differences

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operations. There the Court held that Chrysler could not use the defense. Here again, this case arose before the contract changes allowing reinstatement of grievances. To compound matters, *Geddes* cites and relies on *Willetts* in discussing the UAW's use of the defense, while ignoring it during the discussion of Chrysler's use. The only possible distinction is the nature of the grievance involved. Even so, the best that can be said of the cases is that inadequate scholarship by one panel of a single Circuit does not create a split of the Circuits. Nor does it create a significant federal question.

[19] *Aldridge, supra*, a UAW case, claims to follow *Brady*, despite the inconsistency on the employer's use of the defense. *Pawlak, supra*, appears to be a case where the grievance could still be reinstituted, 444 F. Supp. at 811. *Dezura, supra*, also notes that the defense is only available to the employer where the grievance can be reinstated, 448 F. Supp. 206, 210 (E.D. Pa. 1978). *Neipert* v. *Arthur G. McKee & Co.*, 448 F. Supp. 206, 210 (E.D. Pa. 1978) expressly follows the D.C. Circuit's *Winter*, requiring the possibility of grievance reinstatement before the defense is available to the employer.

[20] The Eighth Circuit holding in *Rainey* v. *Mo. Utilities Co.*, 596 F. 2d 310 (8th Cir. 1979) may be harmonized with *Petersen* v. *Rath Packing Co.*, 461 F. 2d 312 (8th Cir. 1972). In *Petersen*, the Circuit affirmed the District Court's alternative holding that exhaustion of union remedies was generally unavailable as a defense to the Company; and was, on that record, *specifically un*available to *either* defendant because of futility. The case involved sex discrimination in job classifications, and exhaustion would have required the women to present their case for a vote of the local union, where the men outnumbered the women 4-1. *Rainey*, however, involved an individual employee whose claim could have been effec-

asserted by Petitioners are nothing more than the variety of emphasis, phraseology, and attention to detail which must be expected where a body of law must be applied to varying sets of facts. A trip into this factual thicket would not serve any useful purpose.[21]

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tively handled through the union procedures. The Court quotes *Neal* v. *System Board of Adjustment*, 348 F. 2d 722 (8th Cir. 1965), for the general rule "that a plaintiff must exhaust all of the union's available internal remedies, or show an adequate reason for his failure to do so, before he seeks relief against his union in the federal courts." 596 F. 2d at 314, emphasis deleted. Without further explanation, the Circuit affirms the summary dismissal as to all parties. The Court's action is probably explainable as a case where the grievance could be reinstated but this is not clear from the text of the opinion. Here again, inadequate attention to (then) Judge Blackmun's holding in *Neal* by his successors on that bench creates neither a split, nor an important theoretical issue crying for resolution by this Court.

[21] ITT Gilfillan's remaining arguments only ask the Court to reopen long-established rules. The union is not an indispensable party to a breach of contract suit against the employer. The possibility of back seniority as relief does not alter this. If it did, the union would become a necessary party to every § 8(a)(3) discharge proceeding against an employer under the National Labor Relations Act, *as amended*, 29 U.S.C. § 158(a)(3). This would not only be unworkable, it would be contrary to 40 years of precedent under that Act. ITT Gilfillan would have this Court re-examine the settled law of *Czosek* v. *O'Mara*, 397 U.S. 25, 28-30 (1970), and *Vaca* v. *Sipes*, 386 U.S. 171 (1967), that the union and employer may be sued separately, since the claim against each, as well as the remedy, springs from distinct sources, *i.e.*, § 301 of the Labor Management Relations Act, 29 U.S.C § 185, as to the employer, and an implied right in § 9(a) of the National Labor Relations Act, with jurisdiction under 28 U.S.C. § 1337, as to the union.

CONCLUSION

For the foregoing reasons, the Court should *deny* both ITT Gilfillan's Petition, and Clayton's Cross-Petition for *certiorari.* If *certiorari* is nevertheless granted, it should at least be limited to Issue No. 1 in ITT Gilfillan's petition, which, even on Petitioners' view of the caselaw, is the only controversial issue presented.

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August 11, 1980

Nos. 80-5049 and 80-54

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CLIFFORD E. CLAYTON,

Petitioner,

v.

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Respondents.

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On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONER CLAYTON

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the UAW internal appeal, assuming it could afford Petitioner any relief at all, is adequate to enforce Petitioner's contractual rights arising out of his allegedly wrongful discharge by ITT and the alleged breach by UAW of its duty fairly to represent him.

2. Whether the UAW internal appeal, assuming it could afford Petitioner any relief at all, is adequate in light of its inability to afford relief within the period prescribed by 29 USC §411(a)(4).

3. Whether the UAW internal appeal is inadequate because its tribunals lack jurisdiction over the subject matter and an essential party, because they can produce no result helpful to the trial court and because recourse to them would impose duplicative litigation burdens on Petitioner.

4. Whether the UAW internal appeal is inadequate by reason of its incompetence to afford any relief at all to Petitioner.

5. Whether the Court of Appeals erred in holding that the exhaustion of the UAW internal appeal was a mandatory precondition to Petitioner's resort to the courts in order to "forestall unnecessary interference with union affairs."

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BRIEF FOR PETITIONER CLAYTON

OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 623 F.2d 563 (C.A. 9, 1980). It is reported unofficially at 104 LRRM 2118.

The District Court rendered no written opinion. Its "Findings, Conclusions and Decisions," rendered orally, will be found at RT 300 to RT 303. Its Findings of Fact

and Conclusions of Law are at R 397 to R 404. The Judgment is at R 408 to R 409 (A 114).

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

Jurisdiction to review the Judgment of the Court of Appeals by writ of certiorari is conferred by 28 U.S.C. Section 1254(1). The Judgment and Order of the Court of Appeals was entered April 14, 1980. The Petition for Writ of Certiorari on behalf of Petitioner Clayton was docketed in this Court on July 11, 1980.

Jurisdiction of the trial court is predicated upon 29 USC Section 185(a) and (c). Its judgment was entered May 31, 1977, and Notice of Appeal was filed June 27, 1977.

The appellate jurisdiction of the Court of Appeals was invoked under 28 USC Section 1294.

STATUTES AND REGULATIONS INVOLVED

Labor Management Relations Act of 1947, as amended, Section 301; 29 U.S.C. Section 185(a) and (c):

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * *

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Labor Management Reporting and Disclosure Act of 1959, as amended, Section 101(a)(4); 29 U.S.C. Section 411(a)(4):

(e) No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further*, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

STATEMENT OF THE CASE

Petitioner[1] was discharged by ITT February 14, 1975. He initiated this action February 5, 1976 against ITT under §301 of the Labor Management Relations Act of 1947, as amended, 29 USC §185, alleging the discharge to have been a breach of the collective agreement covering him (First Amended Complaint, R 33 to R 36; A 3 to A 5) and against UAW, alleging breach by UAW of its duty fairly to represent him by failing and refusing to take to arbitration his discharge grievance. (R 36 to R 39; A 5 to A 9.)

Both ITT (R 130/21-25; A 12) and UAW (R 137/32 to R 138/3; A 18) asserted as affirmative defenses Petitioner's failure to exhaust his internal union remedies. Petitioner contended that those remedies were inadequate as a matter of law and that the trial court should in its discretion not require his resort to or exhaustion of those remedies as a pre-condition to maintaining his action. Pursuant to Federal Rules of Civil Procedure, Rule 42(b), the trial judge ordered a separate trial on the issue of exhaustion as an issue potentially dispositive of the entire action. (R 141/24-26; A 21). After trial on that issue alone, the trial court determined that the internal remedies of the UAW, and in particular the appeal to its Public Review Board (hereafter "PRB"),

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[1] All references to Petitioner in this brief are to Petitioner Clayton. All other parties will be referred to by their respective names.

were adequate to review and redress Petitioner's grievance and to grant a range of possible relief appropriate to his case. (R 401/9-12.) The Court found that Petitioner had failed to exhaust these remedies and dismissed his action against both ITT and UAW. (R 339/1-19; R 408 to 409; A 114.) Its judgment was entered May 31, 1977. (R 408; A 114.)

Petitioner on June 27, 1977, timely filed his notice of appeal to the Court of Appeals for the Ninth Circuit. (R 411; A 116.) By its judgment of April 14, 1980, that Court affirmed the District Court's dismissal of the claim against UAW and reversed the dismissal of the claim against ITT. The case was remanded for trial against ITT only on the issues of UAW's breach of its duty of fair representation and ITT's breach of its collective agreement. (A 117.)

Petitioner had been employed by ITT for over eight years (RT 140/3)[2] and, since 1967, under a collective agreement between UAW and ITT (Joint Exhibit A, R 54/5-15; A 29 et seq.) which was in force at the time of his discharge. (R 398/6-11; A 29.) He timely filed a grievance in accordance with the provisions of that agreement. (R 398/18-20.) The grievance was duly processed through the three steps of the Grievance Procedure and a timely request for arbitration was made. (R 398/21-24) Thereafter, the International Representative servicing Local 509, and acting in its name,

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[2] References in the form "RT" are to the reporter's transcript.

withdrew the request. (Joint Ex. C; A 78 to A 79; RT 88/21 to RT 89/16; R 398/25-28.) The withdrawal of the request for arbitration effectively terminated Petitioner's grievance and finally closed to him the remedies available to him under the collective agreement. (RT 108/15 to RT 109/7.) He took no steps to invoke the appeals procedure of UAW in relation to the latter's action. (RT 32/17-25; R 399/7-19.)

That procedure is prescribed in the UAW constitution (Joint Exhibit B).[3] Since petitioner's local union was an "amalgamated local" consisting of "units" each comprising a given employer's shop or premises (RT 60/9 to 61/1), the first step of appeal was to the local union (Joint Ex.B, Art. 3; A 70.) That appeal had to be brought within thirty days of the conduct complained of. (Joint Ex.B, Art. 33, §2; A 70.) Failure of the local union to act within forty-five days permits appeal to the International Executive Board (hereafter, "IEB") (Joint Ex.B, Art. 33, §5; A 70 to A 71), and that appeal must be filed with the International President within thirty days. (Joint Ex.B, Art. 33 §6; A 71.) The President is required to secure from the lower tribunal the documents in the case. (Joint Ex.B, Art. 33, §6; A 71.) There appears to be no time constraint within which the President must obtain those documents and submit the matter to the IEB. The appeal is heard by a committee of two members of the IEB which submits its recom-

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[3] Relevant portions of the constitution are excerpted in the Joint Appendix. (A 62 to A 77).

mendation to a nine member committee for final decision. (Joint Ex.B, Art. 33, §7(a); A 71 to A 72.) The IEB is enjoined to "use its best efforts" to decide the appeal within 60 days of its receipt by the President. (Joint Ex.B, Art. 33, §7(c); A 73.) In cases deemed "appropriate" by him the President "may decide an appeal" without reference to the committees of the IEB. (Joint Ex.B, Art. 33, §7(b); A 73.) There appear to be no time limits imposed for such decision. Following decision by the IEB or the President, the case may be appealed either to the Constitutional Convention Appeals Committee (CCAC) or the PRB, and either appeal must be taken in 30 days. There is no time prescribed for decision by either of these bodies.

These provisions also require a member to exhaust all appeals before seeking redress from a civil court or governmental agency. (Joint Ex.B, Art. 33, §12; A 76 to A 77.) UAW counsel, however, conceded at the trial that by virtue of the Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. Section 411(a)(4)), the union's power to require exhaustion is limited to a maximum of four months. (RT 246/2-11.)

The provisions of the UAW Constitution pertaining to the powers of the PRB (Joint Ex.B, Art. 32, A 64 to A 69) are silent concerning the remedies it may order should it find the member's complaint justified. There were received in evidence two decisions of the PRB illustrating its exercise of its powers. Both awarded only backpay; neither dealt with a money award for future loss of earnings. (Joint Ex.F-1; RT 22/8-11; A 89 to A

99; and Joint Ex. F-2; RT 26/8-11; A 100 to A 109.) These decisions were rendered, respectively, four years and two months, and one year and three months after the incidents complained of. It was stipulated at the trial that the PRB had, prior to Petitioner's discharge, awarded as a remedy to certain claimants invoking the procedures of the UAW constitution, back pay for periods prior to the date of the PRB award. (RT 35/12 to RT 36/10.) There is in evidence no decision by the PRB or the CCAC addressing itself to the question of damages for future loss of earnings, whether as a substitute for reinstatement or otherwise. The record contains no policy statement emanating from the PRB, the CCAC, the IEB, or any other officer or body of the UAW, pertaining to the power of the UAW appeals tribunals to award such prospective damages. Other than conferring upon the CCAC "authority to consider and decide all appeals" from the IEB, the UAW constitution is silent on the powers of that body to fashion remedies. (Joint Ex.B, Art 33, §8, A 73 to A 74.)

Under the collective bargaining agreement[4] in effect at the time of Petitioner's discharge, ITT's right to discharge employees covered by the contract was limited to instances of "just cause." (Joint Ex.A, Art. II; A 31.) A determination through the grievance procedure (including arbitration) that an employee was not

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[4] The relevant portions of the collective agreement are excerpted in the Joint Appendix. (A 29 to A 61.) The contract in full is in evidence as Joint Ex. A (RT 54/5-15)

discharged for just cause would result in his reinstatement without loss of seniority. (Joint Ex.A, Art. X, Section 10(b); A 40.)

Seniority is defined as "the length of an employee's continuous service with the Company." (Joint Ex.A, Art. X; A 36). Seniority applies to promotions (Joint Ex.A, Art. X §4 A 37), layoffs and recall rights (Joint Ex.A, Art. X, §5; A 38), the right to replace a less senior employee in a lower paid job in case of layoff (Joint Ex.A, Art. X, §12; A 41 to A 43), shift transfers (Joint Ex.A, Art. X, §8; A 38) bidding for jobs (Joint Ex.A, Art. X, §9; A 39), vacations (Art. XXII §1, A 44 to A 45) and sick pay (Joint Ex.A, Art. XXIII, §1, 2; A 47 to A 48). Benefits under the Pension Plan are directly keyed to length of service. (Joint Ex.A, Art. XXXII and Appendix to the Agreement A 11 to A 15; A 53, A 57 to A 61.) The agreement also provides for automatic wage increases based on length of service and on annual rates negotiated by the UAW. (Appendix to the Agreement A 6 to A 8; A 54 to A 56.)

Other benefits incidental to employment under the collective bargaining contract include Group Insurance and Hospitalization (Joint Ex.A, Art. XXXI; A 52 to 53), paid bereavement pay upon the death of family members (Joint Ex.A, Art. XXVI; A 50), and supplemental jury duty pay (Joint Ex.A, Art. XXVII; A 50 to A 52.)

Petitioner was a shop steward from 1967 to his discharge in 1975. (RT 139/21 to RT 140/3). Shop stewards are elected, and as such they are entitled to seniority over all other employees in their respective areas of representation for purposes of layoff or transfer. (Art. X §7; A 38.)

SUMMARY OF ARGUMENT

1. This is an action under 29 USC §185 to enforce Petitioner's "contractual rights". Under the collective agreement, had his discharge been without just cause, he would have been entitled to reinstatement with back pay in the exercise of the arbitrator's powers. Such relief is judicially preferred in the exercise of the courts' equitable powers. The UAW appeal can neither effect reinstatement nor restore Petitioner's grievance to the contract grievance procedure where reinstatement and back pay would be available. If the union appeals procedure could award Petitioner money damages, this remedy would be totally inadequate. Petitioner's job was unique and its loss is not adequately compensated for with money. Moreover, quantification of money damages can only be an approximation based upon imprecise and partially unknowable data and must therefore contain a substantial element of conjecture. Use of the court's equitable powers to effect reinstatement with back pay affords a form of flexible relief precisely tailored to the needs of the particular case.

2. §411(a)(4) imposes a four months' duration upon any internal union remedy a member may be required to

invoke as a condition of suing his union. On the face of the UAW constitution, the appeals procedure cannot result in a final determination within that period. Counsel for the PRB has stated that the UAW appeals process, whether the appeal goes to the PRB or the CCAC, is structured to "provide a final adjudication of a claim within a period of approximately nine months to a year."

3. The UAW appeal is inadequate because its tribunals lack jurisdiction over the subject matter and over the employer as a party. To require Petitioner to pursue that appeal would produce no result helpful to the trial court and would impose duplicative litigation burdens upon Petitioner.

(a) The UAW tribunals lack jurisdiction over the subject matter of this action. In the setting of this case, Petitioner's claim of breach of the duty of fair representation is part and parcel of his §301 claim for breach of the collective agreement. As such, these claims are controlled by federal law. The tribunal for their trial and adjudication is the court applying federal law. This responsibility was placed upon the courts by *Textile Workers* v. *Lincoln Mills* in order to develop a uniform federal law to effectuate the national labor policy. The fair representation subject matter of this litigation cannot, consistent with these principles, be adjudicated by a union appeals procedure.

(b) The UAW tribunals lack jurisdiction over the employer as a party to their trial of the fair representa-

tion issue. Since Petitioner must prove that the UAW failed in its duty to represent him fairly as a condition precedent to pursuing his claim against ITT, this issue is an important ground of defense for ITT. The UAW tribunals have no jurisdiction over the employer on this issue. Should they try, and "determine", that question without the employer before them as a party, the issue would not have been fully and fairly litigated and the decision would be a nullity.

(c)Exhaustion of the UAW appeal should not be made mandatory on grounds that such procedure would produce results helpful to the trial court. There is nothing in this record to show that a trial of the issue of fair representation would either sharpen the issues or assist judges faced with unfamiliar union rules and practices. Short of a PRB decision (which would come down long after four months) there is no evidence that the UAW procedure would produce a factual analysis or application of union rules. There is nothing to indicate the nature of the record before the UAW tribunal from which the soundness of any such analysis and application could be tested. Traditional adversary judicial proceedings, including discovery, utilized by experienced counsel can provide all the trial judge would need, including expertise, to decide the fair representation question. Any determination by the UAW tribunals would not be binding on the trial court since it would be deeply implicated with questions of federal labor law. The trial court would thus be required either to litigate the issue *de novo* or decide whether it had been heard and

decided fairly and in conformity with federal law. Either course involves extensive factual inquiry and offers no judicial economy. Both courses place excessive burdens of time and expense upon Petitioner.

4. The UAW appeals procedure cannot award Petitioner money damages. Petitioner seeks and can be awarded damages for breach of fair representation only as part of his remedy for ITT's breach of the collective agreement. He proves breach of the duty of fair representation in order to proceed against his employer for his "contractual rights". If Petitioner is to get damages at all, they will be awarded when he prevails against the employer. Only the court can decide that issue, and when it does, the court will, under *Vaca* v. *Sipes*, fashion the remedy, including any allocation of money damages as between ITT and UAW. In this connection, to refer any part of the remedy question to a union tribunal would disregard the court's responsibilities and create oppressive circuity of action.

5. In employment relation matters such as this, (as differentiated from union-membership questions) the doctrine of exhaustion of internal union remedies should not apply. This principle is also applied to employee rights "in the public domain" because stemming from statutory or constitutional command. The employment relation rights here are also in the public domain. The right to fair representation has been declared by the National Labor Relations Act and the remedy to vindicate it was fashioned in *Humphrey* v. *Moore* and *Vaca* v. *Sipes* specifically to vindicate that public right.

ARGUMENT

I

The UAW Internal Appeal Is Inadequate To Enforce Petitioner's "Contractual Rights". Assuming It Can Afford Petitioner Any Relief At All, It Can Neither Effect His Reinstatement Nor Restore His Grievance To The Arbitration Process.

Under the collective agreement here, if the discharge were found to have been without "just cause" (Joint Ex.A, Art. II; A 40), Petitioner would have been entitled to reinstatement without loss of seniority.[5]

In *Vaca* v. *Sipes*, 386 U.S. 171, 185, (1967) this Court held that where the employee could show breach of his bargaining agent's duty fairly to represent him concerning his wrongful discharge, he could seek judicial enforcement of his "contractual rights" against the employer. Such enforcement includes "appropriate damages or equitable relief" (386 U.S. at 196), and in context it would seem plain that the two forms of relief are not to be viewed as exclusive alternatives.

A number of Courts of Appeals have declared that, as mandated in *Vaca*, reinstatement is the preferred mode for judicial enforcement of these contractual rights. In *DeArroyo* v. *Sindicato, etc.*, 425 F.2d 281,

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[5] The collective bargaining contract (Ex.A, Art. X, §10; A 31) provides that senority will be broken by discharge only in the case of discharge for just cause.

291 (C.A. 1, 1970), reinstatement was held to be "a perfectly acceptable form of [judicial] relief for §301 suits against the employer" because that "would have been the likely remedy had the grievance been taken through the greivance procedure as it should have been."[6]

DeArroyo explicitly followed *Brady* v. *Trans World Airlines*, 401 F.2d 87, 102 (C.A. 3, 1968), where the employee sought *inter alia*, judicial enforcement of his contractual right to reinstatement. That court held that this properly invoked the "equitable powers of the court" and affirmed a lower court order of reinstatement with back pay. (401 F.2d at 102-103.)[7]

The Ninth Circuit in *Margetta* v. *Pam Pam Corp.*, 501 F.2d 179, 181 (C.A. 9, 1974), held that "[t]he fundamental teaching of *Vaca* was that, if the discharge is found to have been wrongful, restoration of the employee to her job is included in the relief she may ob-

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[6] The court there observed that reinstatement would not be warranted where there was a showing that the employee would have been properly discharged at a time prior to judgment, or had obtained equivalent employment eliminating "all prospective injury from the improper discharge" or that "delay" since discharge had made reinstatement "impractical." No such facts are in this record.

[7] *Brady* arose under the Railway Labor Act (45 U.S.C. §151 et seq.) and *DeArroyo*, under the National Labor Relations Act 29 USC §159(a). As the Court in *DeArroyo* observed, the rationale of Brady "applies with equal force under the NLRA" (425 F.2d at 291).

tain." The court held that relief against the union "would not restore her job," and that *Vaca* "indicated" that "adequate relief" may be obtained only by joining the union and the employer."

In *Tatum* v. *Frisco Transportation Co.* 626 F.2d 55, 60 (C.A. 8, 1980), reh. den. 7/30/80, it was held that, to justify exercise of judicial discretion not to order reinstatement, the employer would have to establish "legitimate and substantial business justification showing that reinstatement is inappropriate." In *Butler* v. *Local Union 823*, 514 F.2d 442, 445 (C.A. 8, 1975), *cert. den.*, 423 U.S. 924, judicial discretion to grant the equitable relief of reinstatement was held "more appropriate than an award of damages requiring speculation about future lost earnings." In *Bowen* v. *U.S. Postal Service*, 470 F.Supp. 1127 (W.D. Va. 1979), the court stated its preference for the remedy of reinstatement with full back pay and ordered that if this were not accomplished within 60 days, the employer was to pay the present value of the employee's earnings to the end of his work expectancy apparently without diminution for possible interim earnings.

Upon the authority of *Vaca*, and sound analysis, then, preference for the reinstatement remedy has been rather widely recognized in the vindication of the employee's "contractual rights". This would seem the ineluctable consequence of the principle of restoring to the employee his rights under the collective agreement and thus would point to the direction which the sound judicial discretion spoken of in *Vaca* (386 U.S. at 196)

should take. As is indicated in *DeArroyo*, and *Tatum, supra*, it takes a convincing factual showing of post discharge factors eliminating all prospective injury, or impracticability, or substantial business justification to support the exercise of judicial discretion against a reinstatement award.

There are cases which find in the union remedy a means of judicially enforcing the "contractual rights" of the employee without reinstatement. But these are cases where the internal union tribunals have the power to restore the employee's grievance to the contract grievance procedure. In such circumstances, the effect of the union's breach of its duty to the employee is undone and the employee is once again able to pursue his full remedy under the collective agreement. *Varra* v. *Dillon Companies*, 615 F.2d 1315, (C.A. 10, 1980); *Orphan* v. *Furnco Construction Co.* 466 F.2d 795, 801 (C.A. 7, 1972).

The UAW internal appeals patently fall far short of affording any enforcement of Petitioner's "contractual rights." No agency of the UAW has power to order ITT to reinstate Petitioner with his seniority. When UAW's International Representative withdrew the request for arbitration, Petitioner's remedies under the collective agreement were dead. No agency of the UAW has the power to revive the grievance and restore it to the arbitration process under the collective agreement. Neither ITT nor UAW has contended otherwise in this litiga-

tion. The UAW internal remedy is therefore totally inadequate; it cannot afford Petitioner the core of his contractual rights: reinstatement with back pay or a restoration of the grievance to the arbitral process.

From the evidence the only relief available through the UAW appeal procedure would be an award of money, not restoration to job or revival of the grievance,[8] and the court below so assumed (623 F.2d at 566.) In the case of a discharged employee, such an award would have to apply to two periods of time: *first*, the period from the date of discharge to the date of the award; and *second*, the period from the date of the award to the end of the employee's work expectancy. The UAW constitution (Ex.B, Arts. 32 and 33; A 62 to A 77) is silent on the subject of remedies which the various appellate levels may grant. As the evidence (reviewed in *Statement of the Case, ante*, pp. 7-8) shows the only UAW appeals tribunal which has exercised any power to award money has done so only in a back pay situation, i.e., for the period pre-award. There is in evidence no award and no statement of policy that deals at all with loss of earnings for the future, i.e., a period after the award.

But at all events a monetary award would be woefully inadequate to make Petitioner whole for the loss of his job with its over eight years of seniority and

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[8] It is argued below (Point IV) that the UAW tribunal can not award even money damage in this kind of case.

the attendant length-of-service benefits. Any job that has been held for a substantial period of time is unique, and the trial court so conceded.[9] In the case of Petitioner, a black worker with all the disadvantages his race entails in the labor market,[10] this uniqueness has an especially intense quality. Peititioner had been employed by ITT for eight and one-half years. The seniority so built up entitled him to important benefits with respect to layoff, recall from layoff, bidding for jobs, shift transfers, length of vacation, and in many other working conditions, all of which he lost. (See Statement of the Case, *ante*, pp. 9.) Petitioner also lost eight and one-half years of credited service under ITT's Pension Plan. He lost entitlement to wage rates increased by length of service. He also lost the benefit of UAW representation in collective bargaining, which stands as an instrument for both extending his rights and privileges as an employee and defending those already gained. Because so many of these benefits turn upon Petitioner's length of service, they are unique and cannot be replaced with money. They can be provided only by ITT in the setting of its agreeent with UAW.

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[9] "The Court: A job is a job is a job, and there isn't anything like or equivalent to it." (RT 260/23-24).

[10] U.S. Department of Labor Statistics show that the unemployment rate for black males averaged in 1975 nearly twice that of white males and thereafter has averaged considerably more than twice. In the first five months of 1980, the respective average rates were 10.2% and 4.7%. Employment and Earnings, U.S. Dept. of Labor, Vol. 22, No. 7, Vol. 24, No. 1, Vol. 25, No. 1, Vol. 26, No. 1, Vol. 27, No.1, Vol 27, No. 6.

Additionally, it may be assumed that in his period of service Petitioner had developed a familiarity with the duties of his job, the procedures and routines of his employment, and the capacities and peculiarities of his co-workers and superiors, all of which undoubtedly made it possible for him to perform more satisfactorily and thus afforded him some greater assurance of permanence in employment. He had developed associations and friendships with fellow employees. He had achieved a measure of recognition from them by reason of his having been selected and reelected as their shop steward from 1967 to the date of his discharge. All of these intangibles, taken together with the specific rights attendant upon his seniority under the UAW contract, make it clear that the trial court was right in saying that as to Petitioner, "there isn't anything like or equivalent to" his job at ITT. (RT 260/23-24.)

Finally, a money award designed to compensate Petitioner for loss of this unique employment relation would be so speculative as to be extremely difficult to quantify and capable of either depriving the employee of a just award or compelling an employer to make an excess payment.[11] For in these circumstances, the award

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[11] See *Butler* v. *Local Union 823*, 514 F.2d at 455. In *DeArroyo, supra*, the court adverted to the "admittedly difficult problems of quantifying future lost earnings" and observed that this should not "force the parties to accept a more drastic remedy of reinstatement". The context of this observation plainly indicates that the court intended this to mean that where post-judgment

would have to compensate him for not simply his lost earnings down to the time of the award; it would also be necessary to quantify his future losses over the balance of his work expectancy when he could no longer have the job security and other rights which his employment and length of service at ITT had earned for him. Note has already been made of the effect of seniority upon Petitioner's job security in cases of layoff and right to recall when the work force is reconstituted. Similarly, reference has been made to the operation of length of service as a factor in promotion, wage increases, vacation, sick leave, lateral transfers and pensions. To determine Petitioner's loss from the deprivation of those rights and privileges entails comparing his expectable work history spent under the protection of the UAW-ITT agreement with his expectable work history in the employ of some other employer[s]. As to such substitute employment, there is no way of ascertaining whether it would be covered by any collective bargaining contract at all and, if it were, whether the terms of such contract would be different, and in what respects, from those of the contract here, especially with respect to the job security and benefit factors just indicated. One can be sure only that at a different employer, Petitioner's seniority from ITT would be

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developments made reinstatement inappropriate or impractical the problems of quantifying future earning losses should not of themselves compel reinstatement. (425 F.2d 291-292.)

unavailable and he would start at rung one of the seniority ladder.

In making such comparison, for example, one would have to be able to predict with reasonable probability the frequency of Petitioner's foreseeable layoffs, if any, at ITT given his eight and one-half years of seniority, and the likelihood and promptness of Petitioner's recall to employment after each such layoff. Similarly, it would be necessary to predict a like employment history with a new employer and newly accumulated seniority. It is impossible to predict such events at all. They turn on matters over which the parties, and especially Petitioner, have no control; these matters include economic and technological developments and the vicissitudes of the business cycle, as well as the risks of business management, as to which proof is simply not available.[12] In short, the remedy of money damages as it applies to loss of future earnings contains a large element of the conjectural.

In personal injury cases and antitrust cases, (cases "on the law side") these elements are usually resolved

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[12] But it can be said that in the stage of erratic growth in the economy of the United States and the persistence of unemployment (particularly among blacks) since February 1975, when plaintiff was discharged, his seniority of eight and one-half years was of critical, if incalculable, value. See e.g., Economic Report of the President, January 1977, G.P.O. pp. 23-24; U.S. Department of Labor News (Bureau of Labor Statistics), published monthly from the period 1975 to date.

by what, on the data available, is "reasonable" in the mind of the trier of the facts. *See, e.g., Thompson v. Brotherhood of Sleeping Car Porters*, 367 F.2d 489, (C.A. 4, 1966); *Richardson* v. *Communication Workers of America*, 443 F.2d 974 (C.A. 8, 1971); *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 367 (1927); *Story Parchment Co.* v. *Patterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931). The calculations involved in determining what is "reasonable" are of necessity rough and afford at best only an approximation. But in enforcing the "contractual rights" of employees situated as is Petitioner here, the courts under *Vaca* and its progeny exercise equitable powers pertaining to reinstatement and restoration of seniority. (*Vaca* v. *Sipes, supra*, p. 196; *DeArroyo, supra,* pp. 290-292; *Margetta, supra*, p. 181.) Arbitrators of course also exercise such power. The trial court (or the arbitrator) is therefore able to fashion a relief that will precisely (and without conjecture or surmise or a sense of the "reasonable" based on imprecise data) make Petitioner whole for the future: reinstatement with full seniority. Indeed, this would seem under the cited cases to be the preferred remedy, except for situations of impracticality which are not present here.

The object of equity jurisdiction is, of course, not to punish the wrongdoer or compensate his victim. It is to restore the plaintiff to the enjoyment of the rights interfered with to the fullest extent possible. It is to restore the victim as near as may be to the position he would have occupied but for the defendant's wrong.

Graves v. *Romney*, 502 F.2d 1062 (C.A. 8, 1974), *cert. den.*, 420 U.S. 963; *Silva* v. *Bell*, 605 F.2d 978, 985 (C.A. 7, 1979). Unlike the law court that attempts, e.g., to make whole with money the individual who has lost a limb through another's negligence or business opportunities through others' unlawful trade combinations, equity jurisdiction molds its decree to the necessities of the particular case. *Hecht Company* v. *Bowles*, 321 US 321 (1944). Because of its flexibility the equity court can arrive at adjustment and reconciliation of competing interests with a nicety unavailable to law courts and money damages.

The UAW internal appeal procedure, as disclosed on this record, cannot afford Petitioner an adequate remedy to enforce his "contractual rights." He was entitled to a trial before the District Court on the question of breach by UAW of its duty fairly to represent him and breach by the employer of its obligation not to discharge him without just cause.

II

The UAW Internal Appeal Cannot Provide A Remedy Within The Four Month Period Prescribed In 29 USC §411(a)(4).

§411(a)(4) forbids unions to limit the rights of their members to resort to the courts except that members may be required to exhaust reasonable hearing procedures within the organization which do not exceed a four month lapse of time. This provision is not a grant of power to the unions to restrict their members' right

to sue. It is a limitation upon that power, and whether any exhaustion of internal remedy will be imposed in a given case is discretionary with the trial court. *NLRB* v. *Ind. Union of Marine Shipbuilding Workers*, 391 U.S. 418, 426 (1968). The statute has this effect in suits seeking the vindication of "employee rights" as well as in those based on internal union problems. *Operating Engineers* v. *Burroughs*, 417 F.2d 370, 373 (C.A. 9, 1969), *cert. den.* 397 U.S. 916; *Ross* v. *Int'l Brotherhood of Electrical Workers*, 544 F.2d 1022, 1024 (C.A. 9, 1976); UAW counsel conceded at trial that the statute applied to suits of this kind. (RT 246/2-11.)

The various steps in the UAW appeals procedure and the time constraints, such as they are, have been analyzed in the Statement of the Case, *ante*, pp. 6-7. The local union must decide the appeal within 45 days. The IEB must use its best efforts to dispose of an appeal within 60 days from its receipt by the International President. But the latter appears to have wide discretion to decide an appeal himself and without time constraint. It would seem that the appellate tribunals, short of the PRB or CCAC, would use at least 105 days, and that calculation makes no allowance for the President's taking more than 60 days. Assuming such diligence by the appellant that at each appellate step he uses only five of the 30 days allowed to him to file this appeal, it would take 120 days (4 months) merely to get the appeal to the highest level, i.e., the PRB or the CCAC. Neither of these bodies has any time constraints. The counsel of the PRB has stated that the UAW appeals procedure "is

designed to . . . provide a final adjudication of a claim within a period of approximately nine months to a year."[13]

It was, of course, the powers of the PRB which the trial judge found to be "functionally adequate within the requirements of the instant case" (R 402/28 to R 403/2). It was the appeal to the PRB that he found provided "an objective forum and tribunal" rendering the UAW remedies "as a matter of law, adequate." (R 402/16-21.) On the face of the UAW constitution and by the appraisal of the PRB counsel, the appeals procedure (with its restricted powers) is structured to dispose of matters over a period markedly in excess of four months. It falls far short of the command of §411(a)(4).

Nor should §411(a)(4) be read as requiring Petitioner to pursue his UAW appeals for a period of four months. For the reasons set out in Points I, III, IV and V, these appeals afford a remedy inadequate as a matter of law. To have required Petitioner to occupy four months in such pursuits would be to require resort to an idle act. Equity does not "require a useless thing nor insist upon an idle formality". *Stewart* v. *United States*, 327 F.2d 201, 203 (C.A. 10, 1964); *Munchak Corp.* v. *Cunningham*, 457 F.2d 721, 725 (C.A. 4, 1972).

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[13] David Y. Klein, Esq., "Enforcement of *The Right to Fair Representation: Alternative Forums*," in the *Duty of Fair Representation*, Jean T. McKelvey, ed., Cornell University, 1977, pp. 98, 112.

III

The UAW Appeal Is Inadequate Because Its Tribunals Lack Jurisdiction Over The Subject Matter And An Essential Party. To Require Petitioner To Pursue That Appeal Would Produce No Result Helpful To The Trial Court And Would Impose Duplicative Litigation Burdens Upon Petitioner.

(a) The UAW appeal is inadequate because its tribunals lack jurisdiction over the subject matter.

A claim that an employee's discharge violates a collective agreement and that his union has breached its duty of fair representation in connection therewith is an action "arising under §301 . . . and is controlled by federal law." *Humphrey* v. *Moore*, 375 US 335, 343-344 (1964),. The application of that principle was spelled out more fully in *Vaca* v. *Sipes, supra*, where the Court held that the employee's claim of violation of the collective agreement is a "§301 suit" which is maintainable "provided the employee can prove that his bargaining agent has breached its duty of fair representation in its handling of the employee's grievance." (386 US at 186.) Proof of the latter, it was held, is "part and parcel of his §301 claim." (Idem.) In these lights it is incontestably true that, the action being "controlled by federal law" (*Humphrey* v. *Moore, supra*), the courts are the "primary guardians of the duty of fair representation," in the language of the Second Circuit adopted by this Court in *Czosek* v. *O'Mara*, 397 US 25,27 (1970.) In

that case both courts exercised their guardianship by a liberal reading of the pleadings so as to reserve to the judicial arena the trial of the fair representation issue. Here the Court is asked to wield the judicial guardianship in order to save for the courts, in this §301 lawsuit, the interpretation and application of the duty of fair representation. In this, the Court is being asked to fulfill the judicial responsibility first defined in *Textile Workers* v. *Lincoln Mills*, 353 US 448 (1957). From that day forward the declaration and application of law under §301 has been a process entrusted to the courts, purposed to develop a federal law that effectuates national labor policy and uniformity. This subject matter cannot be entrusted to union tribunals except by abdication of the responsibilities imposed by *Lincoln Mills, supra*.

Moreover, the UAW tribunals other than the PRB are singularly unqualified to adjudicate this important question of §301 law. Petitioner would have appealed to the "delegate body" of his amalgamated local union and thence to the International President and the IEB. (Joint Ex.B, Art. 33, §3, 5, 6, 7; A 70 to A 73.) The CCAC is selected from among convention delegates from each of the UAW's geographic regions. (Joint Ex.B, Art. 33, §8; A 74.) Whether or not participation of such individuals places the union in the position of sitting as judge in its own case (cf *In re Murchison*, 394 US 133, 136 (1955)), the potential for adjudication of important federal rights predicated upon collateral and irrelevant considerations cannot be disregarded. (*See*

Fox and Sonenthal, "§301 And Exhaustion of Intra Union Appeals; A Misbegotten Marriage" 128 Univ. of Pa. Law R. 989, 1005-1007.) Given the concern this court has already expressed for the protection of the rights of individual workers in a collective bargaining process controlled only by his union and his employer (*Vaca* v. *Sipes*, 386 US at 182; *Hines* v. *Anchor Motor Freight, Inc.*, 424 US at 564-565) the UAW tribunals offer a slim and uncertain reed.

(b) The UAW appeal is inadequate because its tribunals lack jurisdiction over the employer as a party.

Since, under *Vaca*, the employee must prove his union's breach of duty of fair representation as a precondition to proceeding against the employer in order to vindicate his "contractual rights" (386 U.S. at 186), the question whether the union has failed in this respect is a most important ground of defense for the employer. Indeed, the employer is required to litigate the issue alone in those actions where the employee has chosen to sue only the employer. See, e.g., *Vaca* v. *Sipes*, 386 U.S. at 186-187; *DeArroyo*, 425 F.2d at 286-287.

The UAW appeals procedures make no provision for the participation therein of the employer as a party. There is no basis in law whereby the UAW tribunals could subject the employer to their jurisdiction in an appeal pertaining to fair representation. Thus, in the absence of the employer's agreement to accept the union tribunal's determination on this issue such a decision

would have no effect at all. It could be neither a final decision on the question, nor helpful to the court because in the absence of the employer the issue would have been neither fully nor fairly litigated.

Moreover, the employee would be prejudiced by the absence of the employer as a party. The question of the union's fairness in representing the employee may well have involved conduct in which the employer was a participant or an observer. Unless he can compel testimony or documents from the employer, the employee would most likely be deprived of access to that information.

(c) Exhaustion of the UAW appeal should not be made mandatory on grounds that such procedures would produce results helpful to the trial court.

A principal ground for the decision below is the notion that "administrative filtration" would sharpen the issues and assist judges "faced with unfamiliar rules and practices". (623 F.2d at 566-567, n.3) Apart from the inability of the UAW tribunals to have all parties before them, there is nothing in the record which affords information as to whether at any statge of the UAW procedure[14] there would be a factual analysis or application of internal "rules and practices" which could be of guidance to the court. Nor can it be ascertained from

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[14] Other than a PRB decision which cannot eventuate within the time prescribed by §411(a)(4).

the evidence in this case what would be the nature of the record underlying such a determination, for there is no information as to how, in the UAW appeal process, the issues are framed, the facts adduced, or the record made.

Moreover, the need for "administrative filtration" is overstated. To the extent that the court may be faced with "unfamiliar rules and practices", union counsel and union officers, as well as the employee's lawyer and his witnesses, are perfectly capable of marshalling and presenting the facts, developing any needed expertise, interpreting union rules, refining the issues for the benefit of the trial judge. Discovery is available to both sides of the judicial proceeding in order to bring out all essential facts in advance of trial. These processes in an adversary proceeding are our traditional way of disposing of such problems. There is nothing here which would be strange to judicial experience. Issues such as bad faith, discrimination and perfunctoriness are familiar grist in all judicial mills. One trial of the claimed breach of the duty of fair representation, and that before the court, is all that is needed to an informed adjudication of it. Two trials are not only unnecessary, they might well produce conflicting results. It is certain that they will contribute heavily to the exhaustion of the worker about which this court warned in *Marine Shipbuilders*, 391 U.S. at 425.

The determination of the UAW tribunals would lead to duplicative litigation of the fair representation issue. Since there are involved questions of federal labor law to be determined and applied by the courts so as to

effectuate a uniform national labor policy, the trial court could not be bound by the union's adjudication of its own conduct. The court's alternative would seem to be to litigate the issue *de novo* or to determine whether the union tribunal proceeding was fair and its determination in conformity with the standards of the federal labor law developed by the courts. Either course involves searching factual inquiry, and the likelihood of judicial economy is extremely remote. The consequences of such a course would be that the aggrieved employee, relying on his limited resources, would be compelled to litigate the fair representation issue twice. Such an onerous burden would seem as unnecessary as it is excessive.

IV

The UAW Internal Appeal Is Inadequate By Reason Of Its Incompetence To Afford Any Remedy To Petitioner.

The court below found the UAW appeals procedure "adequate" as respects the union because in awarding money it could give Petitioner "no different relief" from that which the courts can give. (623 F.2d at 566.) In this, the Court of Appeals wholly misconceived the nature of this action. Petitioner sues the UAW to establish facts necessary to vindicate his "contractual rights" against ITT. He does not seek, nor can the courts give him, damages for the union's failure to represent him fairly, considered alone and without

reference to the employeer's breach of the collective agreement. That failure is established only as a precondition to pursuing his remedies under the collective agreement. (*Vaca* v. *Sipes*, 386 US at 186.) Initially his "remedy" upon Proving breach of the duty of fair representation is only his right to pursue his action against ITT. Whether the union is answerable to Petitioner in money damages must await a court determination of the contract violation question. But the union's answerability in this respect is only for an apportionment of the loss stemming from the employer's breach of the collective agreement consisting of "increases" attributable to the union's breach of duty. *Vaca* v. *Sipes*, 386 US at 197-198. Plainly, if the employer has not breached the collective agreement, the union's failure has caused no damage.

There would seem to be nothing in this Court's approval, in *Czosek* of a separate action by the employee against the union which makes against the foregoing. The facts in *Czosek* are materially different. The claim against the employer was dismissed for failure to exhaust remedies under the Railway Labor Act, and that aspect of the case was not before this Court. (397 US at 27, 29-30.) This Court decided only that the employer's dismissal from the action did not deprive the employee of his action against his union for failure to represent him fairly. Since there had been no decision on the merits of the employee's claim against the employer, that issue was still to be decided, judicially. Nor was it decided that the employee could recover against the

union in the absence of a showing that the latter's failure pertained to a meritorious claim by the employee against the employer. The Court expressly reserved decision on whether on a case like the present one "the employer may always be sued with the union". (397 US at 29-30.) In *Vaca*, the Court observed that the employee's claims against the employer and the union "probably should" be joined. (386 US at 197.) Finally, in *Czosek* the Court was not confronted with questions raised here concerning the relationship, if any, between the employee's remedies agaisnt the employer and the union, both judicial and intraunion.

The union tribunal is plainly without jurisdiction to decide the issues pertaining to the breach of the collective agreement by ITT. No law confers such a power upon the UAW appeals procedure, and it has otherwise no jurisdiction over ITT. The UAW tribunals cannot compel the appearnace and participation of ITT. They do not have the power to summon witnesses or secure the production of documents. Clearly under *Vaca*, the issues of the employee's "contractual rights" against the employer are for the court to determine as is the remedy. (386 US at 195-198.) Assuming that the employee proves breach of both the union's duty fairly to represent him and the employer's obligations under the collective agreement, the remedy is to be fashioned by the Court on the basis outlined above. (Idem.) It is only at this point in the case that "money damages" (623 F.2d at 566) could arise. But until that time the responsibility of the union in damages to Petitioner will

not have arisen, and there would be nothing for the union tribunal to decide or award in that connection.

When the question of Petitioner's remedy shall have arisen, however, it is for the court to determine the nature of the remedy and its allocation as between ITT and UAW. At that stage, to call upon the union tribunal to fashion any part of the remedy against the union would be both an abdication of judicial responsibility and the creation of inexcusable circuity of action.[15]

V

The Court Of Appeals Erred In Making Exhaustion Of The UAW Appeal Procedure Mandatory In Order To "Forestall Unnecessary Interference With Union Affairs".

The subject of Petitioner's action here is his employment relationship with ITT: his discharge and his claim for reinstatement with back pay. Other than claiming that UAW did not represent him fairly in his

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[15] There may be situations in which, because of dissolution or bankruptcy or the like, the employer could no longer be able to reinstate the employee or to respond in damages so that the only relief available to the employee would be money damages. Under the comparative fault doctrine of *Vaca*, this might result in the union's bearing the full monetary responsibility for the vindication of the employee's "contractual rights". But it would not expand the union tribunal's competence to decide that the contractual violation had occurred or to fix the damages. Those would continue

discharge grievance, Petitioner makes no claim concerning his internal relationship within the UAW. In these circumstances, exhaustion of the internal union remedy should not be required.

It has been persuasively reasoned in *Brady* (401 F.2d at 102), that the exhaustion of internal union remedies doctrine applies only to "wholly internal union matters" and not to a dispute which "focuses on the employment relationship". This, plus the fact that the employee is seeking reinstatement, which is a remedy unavailable to him within the internal union procedures, was held to relieve the employee from exhausting the union remedy before filing his lawsuit.[16] This reasoning

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to be matters for the court. A similar result would probably occur in the remand of *Czosek* if no claim were made against the employer laying a basis for relief against it. But these questions are not reached in this proceeding.

[16] *Brady* is miscited in the opinion below. (623 F.2d at 566). At the portion of the opinion there referred to, the *Brady* court carefully distinguished between that part of the employee's claim alleging "different treatment" by the union in its internal relations with him (i.e. his "union-member" relationship) from that part of his claim involving his "employer-employee relationship". It was as to the former that the *Brady* court held exhaustion of the internal union remedy mandatory because it "forestalls judicial interference with the internal affairs of a labor organization . . ." (401 F.2d at 104.) Earlier on the same page, the *Brady* court repeated what had been said elsewhere in the opinion (401 F.2d at 102) that because one of the employee's claims "involved the propriety of the discharge, and thus the employment relationship, Brady was not required to exhaust his internal union remedies". as to it (401 F.2d at 104).

commends itself for adoption as national policy. In the "employment relationship" where the aggrieved employee seeks to vindicate contractual rights beyond the power of the union alone to enforce, the doctrine of exhaustion of union internal remedies should not be applied.

Closely akin to *Brady* are cases which deal with employee rights that stem from statutory or constitutional command. In *NLRB* v. *Industrial Union of Marine Shipbuilders*, 391 U.S. 418, 428 (1968), this Court held that a member's failure to resort to internal union appeals before suing his union officer could not be a basis for discipline. There the employee was regarded as exercising rights in the "public domain" designed to effectuate important public policy in the federal labor law. This doctrine was applied in *Bise* v. *International Brotherhood of Electrical Workers*, 618 F.2d 1299 (C.A. 9, 1979) where employees who had worked during a strike sued to nullify the union's discipline. The union's internal procedures were held an inadequate remedy because "the plaintiffs have raised issues that are in the public domain" (618 F.2d at 1303-1304.)

The "employment relationship" matters in *Brady* and here also involve matters in the public domain intimately connected with the effectuation of public policy. The employee's right to fair representation has been declared by statute under the Railway Labor Act 45 U.S.C. §152, Fourth, Eleventh, *Steele* v. *Louisville & Nashville Railroad*, 323 US 192 (1944), *Conley* v. *Gibson* 355 US 41 (1957) and under the National Labor

Relations Act 29 U.S.C. §159(a); *Vaca* v. *Sipes, supra, Humphrey* v. *Moore* 375 US 335 (1964). The latter cases fashioned the remedy under §301 precisely for the vindication of that public right. The employee rights involved in the instant case and *Brady, supra*, reach deep into the fabric of the national policy to promote industrial peace and the improvement of wages and working conditions through collective bargaining. Moreover, to the extent that the action against the employer over the wrongful discharge gives the employee a hearing which in a sense substitutes for the arbitration hearing of which he was wrongfully deprived, the case involves also the vindication of the national policy to promote and encourage arbitration in the advancement of industrial democracy and the peaceable resolution of industrial disputes. See *Steel Workers Trilogy Cases*, 363 US 564, 574, 593. (1960).

CONCLUSION

For the reasons set out above, the following disposition should be made with reference to Petitioner Clayton's cause:

(a) The judgment in favor of the UAW respondents and against Clayton should be reversed.

(b) The judgment in favor of Petitioner Clayton and against Respondent ITT, should be affirmed.

(c) The entire case should be remanded to the District Court for trial of Petitioner Clayton's claims that the UAW Respondents breached their duty fairly to represent him and Respondent ITT violated his contractual rights by discharging him without just cause.

Respectfully submitted,

/s/ JOHN T. MCTERNAN
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Supreme Court, U.S.
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Nos. 80-5049 & 80-54

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CLIFFORD E. CLAYTON,
Petitioner,
v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) and its LOCAL 509,
Respondents.

ITT GILFILLAN,
Petitioner,
v.

CLIFFORD E. CLAYTON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR UAW & its LOCAL 509

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

A discharged employee's grievance is withdrawn from the contractual procedure, short of arbitration, by a low-level union official. The union's constitution provides for appeal of that decision, both to higher levels and to neutral independents. The employee does not initiate those remedies.

Is such an employee entitled to an instant and unencumbered opportunity to litigate in federal court, against both employer and union, or should the judiciary hold its hand until exhaustion of those remedies, or futility, is shown?

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BRIEF FOR UAW & its LOCAL 509

OPINIONS BELOW

The opinions below are reported at: *Clayton* v. *ITT Gilfillan, UAW & Local 509*, 623 F. 2d 563 (9th Cir. 1980), 104 LRRM 2118, 88 CCH Lab. Cas. ¶ 12,009, *revising*, —— F. 2d —— (9th Cir. 1979), 102 LRRM 2190,

87 CCH Lab. Cas. ¶ 11,545.[1] As revised, the Circuit Court's opinion reversed in part, and affirmed in part, the unreported decision of the District Court,[2] which entered judgment in favor of ITT Gilfillan and the UAW.[3]

COUNTERSTATEMENT OF THE CASE

Clayton was discharged by ITT Gilfillan in 1975 for violation of a shop rule against lewd, indecent and immoral behavior in the plant.[4] Under the "management

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[1] *Reprinted* in Appendix to ITT Gilfillan's Petition, hereafter "Pet. App." That Appendix is not consecutively paginated. Accordingly, we cite documents in that Appendix by title and page within the item, *e.g.*, "Finding of Fact No. 1, Pet. App. 2" will refer to page 2 of the Findings of Fact, as reprinted in the Appendix to ITT Gilfillan's Petition. The Joint Appendix will be cited "J.A." The Record will be cited "R. 15". The trial transcript will be cited "Tr. 63".

[2] The District Court's Findings of Fact and Conclusions of Law are reprinted at Pet. App. 1-18.

[3] The full name of the parties appears in the caption. "UAW" or "Union" will refer to both the International Union and its Local 509, unless otherwise indicated by the context. When only one of the union defendants is intended, the reference will be to the "International Union" or to "Local 509".

[4] Finding of Fact No. 4, Pet. App. at 3-4. The rule itself provides: "Violations for which the employee will be suspended with a recommendation for discharge pending results of an investigation include, but are not limited to the following . . . (4) Immoral or indecent conduct". J.A. 79. Mr. Clayton's precise behavior is not detailed in this record. Suffice it that the conduct in question was neither genteel nor easily overlooked. *C.f. Geiler* v. *Comm. on Judicial Qualifications*, 10 C. 3d 270, 277-78 n. 6, 284 (1973) (*en banc*); and *e.g.*, *Tomkins* v. *Public Service Electric & Gas Co.*, 568 F.2d 1044 (3d Cir. 1977), and *Barnes* v. *Costle*, 561 F.2d 983 (D.C. Cir. 1977). Yet it is easily more relevant here than his race, a matter about which, despite counsel's recitations, Clayton's Brief at 19, 22 n. 12, the record is just as silent.

rights" clause of the labor agreement, ITT Gilfillan retained the right to promulgate and enforce such rules.[5]

A timely grievance was filed under the labor agreement,[6] and processed, without success, through Step III.[7] The Union filed a timely request for arbitration but, on further consideration, decided not to arbitrate, and so notified Clayton.[8] The International Representative responsible for servicing Local 509, Mr. Gazzigli, was very specific about his reasons: Clayton's version of the incident directly conflicted with that of two eye witnesses; none of the others present would corroborate Clayton's version; Clayton was, as a Steward,[9] well aware of the Shop Rule; and the UAW would not condone such conduct.[10] In short, Gazzigli believed he had done his best, and could not win at arbitration.[11]

Clayton unsuccessfully filed charges with the N.L.R.B., E.E.O.C., and California Fair Employment Practices

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[5] ITT Gilfillan—UAW Agreement, Article II, *reprinted* at J.A. 30-31.

[6] Articles VIII & IX, *reprinted* at J.A. 31-36.

[7] Finding of Fact No. 6, Pet. App. 4. Step III is the last step of the grievance procedure short of arbitration, *see* Agreement, Art. IX § 1, at J.A. 35.

[8] Finding of Fact No. 6, Pet. App. 4.

[9] Clayton's Brief at 10.

[10] Letter, Gazzigli to McCracken, copy to Clayton, dated July 11, 1975, *reprinted* at J.A. 78, *see also* Gazzigli's testimony, Tr. 89, 92. The Ninth Circuit's incidental comment that the reasons for Gazzigli's action are "not stated in the record", 623 F.2d 563, 565, 571 (9th Cir. 1980), Pet. App. 4, 26, is in error. *See*: ¶ 17 of First Amended Complaint, incorporating letter as Exh. C, R. 38 & 125-26, J.A. 7; Exh. B to Affidavit of Clifford Clayton, R. 27-30; R. 367-68; and R. 398, ln. 28, referring to Plaintiff's Exh. 3, admitted at Tr. 192 ln. 9.

[11] Tr. 113, 92.

Commission.[12] Represented by counsel, he filed and litigated a claim for unemployment benefits, during July and August, 1975.[13]

Clayton then filed this action in the Central District of California, alleging breach of contract by ITT Gilfillan, and of the duty of fair representation by the UAW and Local 509.[14] While the Complaint alleges arbitrary, invidious and discriminatory action by the Union,[15] after trial, Clayton abandoned the latter two. His only claim against the UAW is "arbitrary" or "perfunctory" action by Gazzigli on the grievance.[16]

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[12] Finding of Fact No. 11(a) & (b), Pet. App. 8-9.

[13] Finding of Fact No. 11(c), Pet. App. 9-10.

[14] As to ITT Gilfillan, jurisdiction is under § 301(a) & (c) of the Labor Management Reations Act (LMRA), commonly known as "Taft-Hartley", 29 U.S.C. § 185(a) & (c), *reprinted* in Clayton's Brief at 2-3. As to the UAW, however, jurisdiction is under 28 U.S.C. § 1337, to enforce a right implied by this Court into § 9(a) of the National Labor Relations Act (NLRA), *as amended*, 29 U.S.C. § 159(a), since that Act regulates interstate commerce. On this point, the District Court is correct, Conclusion of Law No. 2, Pet. App. 12, and Clayton is wrong, Clayton's Brief at 2, First Amended Complaint ¶ 1, R. 33, J.A. 3, Second Amended Complaint ¶ 1, R. 274. *Vaca* v. *Sipes*, 386 U.S. 171, 177 (1967); *Humphrey* v. *Moore*, 375 U.S. 335, 356-57 (1964) (Goldberg, J., *concurring*). Otherwise the duty of fair representation would expire with the labor agreement.

[15] First Amended Complaint, ¶ 15, J.A. 6, R. 37; Second Amended Complaint, ¶ 15, R. 278.

[16] Plaintiff's Objections to Proposed Findings of Fact and Conclusions of Law, at 4, R. 383 lns. 17-26: "There is no evidence that plaintiff's claim was to the effect that Gazzigli's decision not to arbitrate his discharge grievance was based on or a result of fraud, discrimination or collusion with management. The evidence is plain and undisputed that plaintiff's claim is now, and always has been, that the refusal to take his discharge grievance to arbitration resulted from 'arbitrary' action by Gazzigli, as that term is defined in the decided cases—*i.e.*, 'perfuntory', not based on

By agreement, the trial was trifurcated by issue: *first*, exhaustion of remedies under the UAW CONSTITUTION; *second*, fair representation; and *third*, breach of contract.[17]

After trial of the first stage, the District Court entered judgment for both ITT Gilfillan and the UAW because Clayton failed even to initiate remedies available to him under the UAW CONSTITUTION.[18] Crediting Gazzigli and other defense evidence rather than Clayton,[19] the trial court found:[20] Articles 32 and 33 of the UAW CONSTITUTION provide remedies to individuals who are aggrieved by actions of the UAW or its representatives.[21] It was stipulated that Clayton failed to initiate, let alone exhaust, these remedies. Although these remedies were available to him, Clayton did not go either to the membership of Local 509, the UAW's International Executive Board (I.E.B.),[22] the Public Review Board

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a consideration of 'relevant, permissible union standards,' *Vaca* v. *Sipes*, 386 U.S. 171, 190, 191 . . . (1967) . . ." Counsel repeats the point again at 6, R. 385 lns. 23-26, and at 7, R. 386 lns. 12-15.

[17] Pre-Trial Conference Order, IV, J.A. 21.

[18] Conclusions of Law, 3-8, Pet. App. 12-17; Judgment, J.A. 114-15, R. 408-9. The District Court's explanation from the bench is at Tr. 300-304.

[19] Tr. 300 lns. 17-21. The disputed issues were essentially limited to whether Clayton was informed of his remedies, how, and when. Since he did not attempt to use the remedies, he had no independent evidence (as opposed to argument) on their nature, availability, or adequacy.

[20] Findings of Fact, Nos. 7-14, Pet. App. 5-11.

[21] Article 33 is the general provision governing appeals. Article 32 deals specifically with the Public Review Board (P.R.B.). *See*, respectively, J.A. 69-77, and 64-69; and note 23 *infra*.

[22] The I.E.B. is analogous to the Board of Directors of a corporation, but elected by the Delegates to the UAW's triennial Constitutional Convention, rather than stockholders. UAW CONSTITUTION, Art. 7 § 1(b), R. 80; Art. 10, R. 84-86.

(P.R.B.),[23] or the Convention Appeals Committee (C.A.C.).[24] Clayton was specifically advised above these remedies by his Local.[25] Like other members, he also received SOLIDARITY, the UAW's newspaper, by mail. It regularly contained articles about the appeal procedure, including the P.R.B.'s telephone number for questions.[26]

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[23] The P.R.B. is, as the name suggests, a body of seven "impartial persons of good public repute", independent of the UAW, established in 1957 as an institutional "Supreme Court". UAW CONSTITUTION, Art. 32 §§ 1-3, J.A. 64-65; *see generally*, Exh. 9, J.A. 83-86; and *Baldini* v. *UAW Local 1095*, 581 F.2d 145, 149 (7th Cir. 1978). The P.R.B.'s membership, at the relevant time, included, *e.g.*, Theodore J. St. Antoine, then Dean of the University of Michigan Law School, Frank W. McCulloch, then Professor of Law at the University of Virginia, and formerly Chairman of the N.L.R.B., and Harry W. Arthurs, Dean of the Law School at York University in Toronto. J.A. 85-86. Past members include R. W. Fleming, then Professor of Law at the University of Wisconsin, more recently President of the University of Michigan; and Wade H. McCree, Jr., subsequently Circuit Judge and Solicitor General. J.A. 100, 89.

The P.R.B. determines its own budget, which the UAW must fund. Art. 32 § 9, J.A. 68-69. It maintains separate offices, and hires its own staff. Art. 32 § 9, J.A. 69, and *see* J.A. 84. It is self-perpetuating, as the remaining members nominate the replacement in the event of a vacancy. Art. 32 § 2, J.A. 64.

[24] The C.A.C. originated as a standing committee of the UAW Constitutional Convention, selected by lot from the elected Delegates. Art. 33 § 8, J.A. 73-74. It has the appellate authority of the Convention itself, which is supreme under the UAW CONSTITUTION. Art. 7 § 1(a), R. 213. Conflicts between the P.R.B. and C.A.C. do not arise because appellants from the I.E.B. must appeal to one *or* the other. Art. 33 §§ 8 & 9, J.A. 73-75. For their own reasons, some appellants prefer to appeal to an "outside" tribunal (the P.R.B.), rather than an "inside" one (the C.A.C.), or *vice versa*. Thus *both* the P.R.B. and C.A.C. have "final" authority in the UAW's appeal structure.

[25] Finding of Fact No. 8, Pet. App. 6-7.

[26] Finding of Fact No. 9, Pet. App. 7-8. An example article is *reprinted* at J.A. 83-88.

Clayton had previously participated in another's appeal to the Local's membership,[27] and had been a Steward of the Local for the previous 8 years.[28] Clayton was represented by counsel during the period when a timely appeal could have been filed.[29]

Assuming *arguendo* that defendants had the burden, the trial court found that, by a preponderance, the UAW had established the remedies' availability and adequacy, Clayton's failure to exhaust, and the *absence* of futility.[30] These findings are well supported. No evidence of futility or a preordained result was introduced.[31] The various bodies had unquestioned authority over the relevant UAW agents,[32] as well as the right to make Clayton whole with

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[27] Finding of Fact No. 10, Pet. App. 8.

[28] Clayton's Brief at 10.

[29] Finding of Fact No. 12, Pet. App. 10. That attorney advised Clayton to seek more expert advice on his labor law problems, but Clayton did not. *Id.* Nor did Clayton's current counsel, employed shortly thereafter, ask for an extension of the filing periods in the UAW CONSTITUTION.

[30] Conclusions of Law, at 18 n. 1, Pet. App. 18 n. 1; Finding of Fact No. 14, Pet. App. 11. This is a burden which the UAW does not accept, since, absent an appeal, there can only be general evidence on these issues. *Only* Clayton could initiate an appeal, occasioning specific evidence, if any, which might instantiate the arguments his counsel now advances.

[31] Finding of Fact No. 14, Pet. App. 11; Conclusion of Law No. 7, Pet. App. 15.

[32] The authority of the membership, the I.E.B., and the C.A.C. is plenary and, we assume, not seriously disputed here. *See*: UAW CONSTITUTION, Art. 38 § 6, R. 246; Art. 14 § 5, R. 224; Art. 12 § 1, R. 220; Art. 7 § 1, R. 213. The decisions of the C.A.C. and P.R.B. are, under Art. 33 § 8, J.A. 73-74, and Art. 32 § 3, J.A. 64-65, "final and binding".

money damages.[33] Due process is protected at each step of the appellate route.[34]

On appeal, the Ninth Circuit's revised opinion affirmed as to the UAW, but reversed as to ITT Gilfillan, holding that the employer was not protected by the exhaustion defense. The Circuit rejected Clayton's inadequacy arguments:

> The ability to award only money damages does not make the process inadequate: relief against the union in the civil action Clayton now brings would give him no more.
>
> * * * *
>
> Clayton failed to give his union the opportunity to reverse itself. He cannot obtain by judgment now what he would not allow the union an opportunity to afford him under its constitution. [623 F. 2d 563, 566 & 567, Pet. App. 8, 10-11]

This Court granted *certiorari* on ITT Gilfillan's Petition and Clayton's Petition, —— U.S. —— (1980), 49 U.S.L.W. 3332.

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[33] The P.R.B.'s ability on this score is a specific finding. Finding of Fact No. 13, Pet. App. 10-11. The record contains two P.R.B. decisions where such awards were, in fact, made. J.A. 89-109. Clayton contests the adequacy of those awards. Clayton's Brief at 7-8, 18-24. However, he offered no evidence that the P.R.B., let alone the other bodies, *cannot* make broader damage awards. Their broad remedial authority, if anything, suggests the contrary. In any event, that authority, both exercised and potential, *exceeds* that allowed federal courts, in the ordinary case, under *Vaca* v. *Sipes*, 386 U.S. 171, 196-97 (1967), and *Czosek* v. *O'Mara*, 397 U.S. 25, 29 (1970), and *see* even Justice Stewart's concurrence in *Hines* v. *Anchor Motor Freight*, 424 U.S. 554, 572 (1976). Nor can one seriously argue that the I.E.B.'s or C.A.C.'s authority over the UAW's treasury is constrained in any fashion relevant here.

[34] Like any member, an aggrieved individual has the right to present his appeal to the membership of his Local. On appeal to the I.E.B. and C.A.C., he has the right to be present, to have counsel,

SUMMARY OF ARGUMENT

Exhaustion of intra-union remedies, like exhaustion of the collectively-bargained grievance procedure, furthers federal labor policies of minimal judicial entanglement in industrial and union self-government, private and speedy dispute resolution, and the preservation of peace and stability in labor-related matters.

As with the analogous doctrine of exhaustion of administrative remedies, the requirement that an employee must "afford the union an opportunity to act on his behalf" conserves judicial resources, while providing unions with a "fair opportunity to function" within their sphere of expertise.

Neither of the two generally recognized exceptions to this doctrine apply here. The UAW's remedies far surpass minimum standards of adequacy. Clayton should not be heard to speculate that a union appeals system, which he refused to test, is somehow lacking. Nor, on this record, is there reason to believe that any UAW tribunal would have hostilely prejudged his claims against lower-level union officials, or left him without a sufficient remedy. The trial court found the contrary.

Clayton demands an instant and unencumbered right to litigate his discharge in federal court. Prudent restraint, no less than settled federal labor policy, requires this Court to decline that invitation. The courts should hold their hands, absent exhaustion of remedies, or a

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to present materials, and, in most non-trivial cases, to have a hearing. UAW CONSTITUTION, Art. 33 § 4, J.A. 70. The P.R.B. establishes its own procedural rules, Art. 33 § 10, J.A. 75-76, Art. 32 § 6, J.A. 67, and holds hearings near the locale of the appellant. J.A. 84. There is a formal record, Art. 33 §§ 6 & 10, J.A. 71, 75-76, notice, hearing, and a right to counsel. Art. 33 § 4, J.A. 70. The result, throughout the system, probably equals, if not exceeds, the level of due process commonly found before labor arbitrators and administrative agencies.

showing of futility. As to the UAW, the decision below should be *affirmed.*

* * * *

ARGUMENT

Federal labor policy has long been premised on the wisdom of private dispute resolution in industrial life and union affairs. Judicial restraint, coupled with minimal intrusion into the affairs of employers, unions and their collective bargaining relationships, has been the customary means to that end. The requirement that internal union remedies be exhausted as a prerequisite to litigation by an employee against his or her union sensibly furthers this Congressionally-sanctioned, private industrial justice system.

Internal union remedies contribute to higher quality union grievance handling, union democracy, rapid resolution of employees' disputes, and so, to industrial peace and stability. Employees are often able to resolve their claims before union tribunals, which, like their unions, interpret and apply labor agreements as part of their daily business, thereby conserving scarce judicial resources.

Exhaustion of internal union remedies must remain a strict prerequisite to suit, as dictated by federal labor policy. The exceptions for inadequate remedies or futile situations must remain sharply delimited, and narrowly construed, so as not to swallow the rule. In the instant case, the Courts below properly applied the exhaustion requirements, and correctly held that the evidence supported the only possible conclusion: the UAW's remedies were available, adequate, and not futile.

I

Congressional support for industrial self-government is declared in § 203(d) of the LMRA, 29 U.S.C. § 173(d): "Final adjustment by a method agreed upon by the

parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement . . ."

In *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 456, 457 (1957), the Court held that § 301 of the LMRA could be used by a union to compel compliance with the grievance arbitration procedure of a labor agreement, and mandated the development of a federal common law in enforcing these private arrangements.

United Steelworkers of Am. v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), described collectively-bargained grievance and arbitration provisions as "a major factor in achieving industrial peace", and declared that "[t]he present federal policy is to promote industrial stabilization through the collective bargaining agreement." 363 U.S. at 578. Observing that "[i]n the context of the plant or industry the grievance may assume proportions of which judges are ignorant", this Court sharply limited the role of the judiciary to "ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract." *United Steelworkers of Am.* v. *American Mfg. Co.*, 363 U.S. 564, 567, 568 (1960); and *United Steelworkers of Am.* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960).

Doubts should be resolved in favor of arbitrability, because "[t]he ablest judge cannot be expected to bring the same experience and competence [as the arbitrator] to bear upon the determination of a grievance, because he cannot be similarly informed." *Warrior & Gulf Navigation Co., supra*, 363 U.S. at 582-83. Overall industrial self-government is characterized as follows:

> The collective bargaining agreement states the rights and duties of the parties. It is more than a contract;

> it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. (citation omitted) The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant. [*Id.*, 363 U.S. at 578-579.]
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> * * * *
>
> [A] collective bargaining agreement is an effort to erect a system of industrial self-government . . . Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement. [*Id.*, 363 U.S. at 580.]
>
> * * * *
>
> [T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and context are given to the collective bargaining agreement. [*Id.*, 363 U.S. at 581.][35]

Not only must the employer and union avoid litigation in favor of their private justice system, individual em-

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[35] *Accord, Gateway Coal Co.* v. *United Mine Workers of Am.*, 414 U.S. 368, 377-379 (1974); and *Wiley* v. *Livingston*, 376 U.S. 543, 550 (1964): "Central to the peculiar status and function of a collective bargaining agreement is the fact, dictated both by circumstances . . . and by the requirements of the National Labor Relations Act, that it is not in any real sense the simple product of a consensual relationship. Therefore, although the duty to arbitrate . . . must be founded on a contract, the impressive policy considerations favoring arbitration are not wholly overborn by the fact that Wiley did not sign the contract being construed."

ployees must too. An individual must exhaust the contractual grievance procedure prior to litigation. *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965). The dispositive considerations, equally applicable here, are those of federal labor policy:

> The employee must afford the union the opportunity to act on his behalf. Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the "common law" of the plant. LMRA § 203(d), 29 U.S.C. § 173(d); § 201(c), 29 U.S.C. § 171(c). . . . Union interest in prosecuting employee grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance the union's prestige with employees. Employer interests, for their part, are served by limiting the choice of remedies available to aggrieved employees. . . .
>
> *A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it.* [379 U.S. at 653 (emphasis supplied)]

The Congressional view of the desirability of industrial expertise as the alternative to judicial involvement in labor-related matters is amply evidenced in the broad legislative framework, bolstering free collective bargaining and private dispute-settlement mechanisms. Moreover, a broad pre-emption doctrine restricts judicial jurisdiction in much of the labor area, save fair representation, *e.g.*, *Amalgamated Motor Coach Employees* v. *Lockridge*, 403 U.S. 274 (1971):

> The rationale for pre-emption, then, rests in large measure upon our determination that when it set down a federal labor policy Congress plainly meant to do more than simply to alter the then-prevailing

> substantive law. It sought as well to restructure fundamentally the processes for effectuating that policy, deliberately placing the responsibility for applying and developing this comprehensive legal system in the hands of an expert administrative body rather than the federalized judicial system. [403 U.S. at 288]

II

The fair representation doctrine itself is a judicially-created exception to the overall legislative scheme of private, collectively-bargained, industrial justice. To protect unionized employees, initially against race discrimination, *see, e.g., Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944); *Tunstall* v. *Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944), and later, against other forms of arbitrary, discriminatory or bad faith handling of their grievances, the Court evolved a limited exception to the exclusive, final and binding nature of the collectively-bargained procedures. *See, Hines* v. *Anchor Motor Freight*, 424 U.S. 554 (1976); *Amalgamated Motor Coach Employees* v. *Lockridge*, 403 U.S. 274 (1971); *Vaca* v. *Sipes*, 386 U.S. 171 (1967); *Humphrey* v. *Moore*, 375 U.S. 335 (1964); *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953).[36]

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[36] Plaintiff misconceives the nature of an individual employee's rights. The union's rights under a collective bargaining agreement, and the employee's derivative rights thereunder, are purely private contract rights. An employee has no *public* right to have his or her grievance arbitrated. Moreover, the employee has no such *private* right. To the contrary, so long as the union has a rational, non-arbitrary basis for doing so, and absent discrimination, hostility or other bad faith, the union remains free to decide to withdraw even a clearly meritorious grievance. *Vaca* v. *Sipes, supra*, 386 U.S. at 191-92; *Humphrey* v. *Moore, supra*, 375 U.S. at 349-50. This might occur, for example, where an otherwise proper grievance involves a matter of minor significance, or precedential value, compared to the cost of arbitration. The old precept that the quickest way to lose a weak case is to try it, applies equally well to arbitration. There

In those situations,[37] this doctrine permits bargaining unit members the right to obtain relief in federal court against their employer on the breach of collective bargaining agreement claim, where the union has been shown to have failed to meet its duty.

III

To minimize the intrusion of this exception upon industrial self-government, early on lower federal courts required exhaustion of the union's internal remedies as a prerequisite to litigation. *See, Neal* v. *System Board of Adjustment*, 348 F. 2d 722, 726-27 (8th Cir. 1965), and cases cited therein. This Court, in *NLRB* v. *Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418 (1968), characterized the policy behind the exhaustion doctrine as creating "in this labor field a regime comparable to that which prevails in other areas of law before the federal courts, which often stay their hands while a

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is no profit, to either management or to the bargaining unit, in having one's representative create adverse arbitration precedent. Negotiations, compromise, and, if necessary, a realistic concession, are the marks of bargaining maturity for both sides of the table. This, of course, is not news to either Congress or this Court. *Hines* v. *Anchor Motor Freight*, 424 U.S. 554, 567 (1976).

[37] As noted *supra*, n. 16, Clayton's only remaining allegation of a breach of the duty of fair representation is that the refusal to arbitration was "arbitrary" or "perfunctory". Despite the Ninth Circuit's inexplicable oversight, *supra*, n. 10, it is clear, on the face of this record, that Clayton cannot show such conduct. Gazzigli's action was taken for stated, relevant and justifiable reasons, *supra*, n. 10 and accompanying text. Whether he was right or wrong is not material here. His action clearly falls within the "wide range of reasonableness" allowed the UAW. *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 349 (1953); *Hines* v. *Anchor Motor Freight*, 424 U.S. 554, 567 (1976). The Ninth Circuit may be affirmed, as to the UAW, on the alternative ground that, as a matter of law, there was no breach of the duty here. *Dandridge* v. *Williams*, 397 U.S. 471, 475-76, n. 6 (1970).

litigant seeks administrative relief before the appropriate agency." [38] 391 U.S. at 426.

The same values involved in the contractual grievance procedure are served by the internal union remedies:

> [T]here is a basic underlying principle involved here, upon which much of labor-management harmony turns, namely, staying the hand of "judicial interference with the internal affairs of a labor organization until it has had at least some opportunity to resolve disputes concerning its own internal affairs."

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[38] Clayton argues that the exhaustion doctrine, if any, should be limited by an inflexible four month deadline, in large part because of the first proviso to § 101(a)(4) of the Labor-Management Reporting & Discolsure Act (LMRDA), 29 U.S.C. § 411(a)(4), and Justice Douglas' *dicta* for the Court in *Marine Shipbuilding, supra.* Clayton's Brief at 24-26. There are at least two sufficient responses:

The first is Justice Harlan's: "[I]t is appropriate to emphasize that courts and agencies will frustrate an important purpose of the 1959 legislation [LMRDA] if they do not, in fact, regularly compel union members 'to exhaust reasonable hearing procedures' within the union organization. Responsible union self-government demands, among other prerequisites, a fair opportunity to function." 391 U.S. at 429 (Harlan, J., *concurring*) (citation omitted). What is a "fair opportunity" necessarily varies with the facts, and should properly be committed to the discretion of the lower courts. Uniformly, and not surprisingly, that discretion is exercised against litigants who have the sole ability to begin the process, but, as here, refuse to do so.

The second response is that § 101(a)(4)'s proviso, by its own terms, constrains only "a labor organization", not the judiciary. 105 CONG. REC. 17899 (remarks of Sen. Kennedy). Senator Kennedy further explained that the proviso was not intended "to invalidate the considerable body of state and federal court decisions of many years standing which require, or do not require, the exhaustion of internal remedies prior to court intervention depending upon the reasonableness of such requirements in terms of the facts and circumstances of a particular case." 105 CONG. REC. 17899 (remarks of Sen. Kennedy), *quoted in Marine Shipbuilding, supra,* 391 U.S. at 428. Nowhere does *Marine Shipbuilding* conclude that the federal courts are limited by the four month proviso. 391 U.S. at 428.

Brady v. *Trans World Airlines Inc.*, 401 F. 2d 87 (3rd Cir. 1968) . . . [*Imel* v. *Zohn*, 481 F. 2d 181, 183 (10th Cir. 1973)][39]

The internal exhaustion requirement serves critical interests of all parties. It contributes to union democracy, industrial peace and stability, and a more rapid dispute resolution. It conserves judicial resources by either wholly disposing of the case, *or* at a minimum, narrowing and focusing the issues through the union's collective bargaining expertise. Exhaustion may reveal misconduct by union officials, and induce the union to reverse itself, completely eliminating the burden, delay and expense of litigation against the union. Or exhaustion may establish the *bona fides* of the union's representation to the grievant's own satisfaction, again obviating any further proceedings. Finally, should litigation follow, the factual and contractual picture may well have been clarified, with consequent savings in judicial resources. "The national labor policy in favor of private dispute resolution is served by requiring complaints to be processed outside the courts whenever there is an effective process available," *Varra* v. *Dillon Companies*, 615 F. 2d 1315, 1317-18 (10th Cir. 1980).

"The reason for this [exhaustion] requirement is that intra-union remedies are part and parcel of the industrial in-house procedure for settling labor disputes. The primary benefit of requiring initial submission of employee complaints against a union that refuses to help process a grievance against a company is that internal machinery can settle differences short of court action." *Ruzicka* v. *General Motors Corp.*, 523 F. 2d 306, 311 (6th Cir. 1975). It is "bottomed on the hope that such procedures will quickly resolve disputes without the delay inherent in the judicial process and with the aid of persons ex-

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[39] *Accord, Varra* v. *Dillon Companies*, 615 F.2d 1315 (10th Cir. 1980); *Willetts* v. *Ford Motor Co.*, 583 F.2d 852 (6th Cir. 1978).

perienced at resolving member-union conflicts short of a full-blown judicial proceeding". *Id.* at 312.[40]

Even if the union hearing does not fully resolve the matter, it may narrow and clarify the issues, which "may well assist the court when it is later called upon to resolve the controversy", *Detroy* v. *Am. Guild of Variety Artists*, 286 F. 2d 75 (2d Cir. 1961). "Another justification for the doctrine is, of course, conservation of judicial resources."[41] *Buzzard* v. *IAM*, 480 F. 2d 35, 41-42 (9th Cir. 1973).

Exhaustion also promotes union democracy and self-government, as well as the broader policy of non-interference with the private adjustment of grievances and with internal union affairs. Of course, the union's incentive to maintain due process tribunals would be significantly undermined were individuals free to by-pass the union's constitutional procedures.[42] *See, e.g., Battle*

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[40] Some employers and unions have, through collective bargaining, agreed to allow the reinstatement of withdrawn grievances where a union tribunal reverses the union's initial decision. This is true, for example, in the current UAW contracts with the major automobile and agricultural implement manufacturers. Exhaustion of remedies, in those circumstances, falls squarely within *Republic Steel Corp.* v. *Maddox, supra,* as the procedures under the union's constitution have, in reality, become incorporated as a part of the contractual grievance procedure.

[41] The potential burden here should not be lightly underestimated. As the Court noted in *Vaca, supra,* 386 U.S. at 192 n. 15, more than 95% of written grievances are resolved by the parties short of arbitration. Since negotiation begets compromise, the grievant is often not fully satisfied. *Ford Motor Co. v. Huffman,* 345 U.S. 330, 349 (1953).

[42] "If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement," *Republic Steel Corp.* v. *Maddox, supra,* 379 U.S. at 653. Analogously, union remedial procedures lose much of their viability if their usage is not mandatory, at least to the extent of being a prerequisite to litigation.

v. *Clark Equipment Co.*, 579 F. 2d 1338 (7th Cir. 1978); *Imel* v. *Zohn*, *supra*; and *Brady* v. *Trans World Airlines*, 401 F. 2d 87 (3d Cir. 1968).[43]

IV

Generally, only two excuses have been judicially accepted for failure to exhaust internal union appeals procedures. The first is lack of availability of an adequate procedural route, an issue clearly not present here. The UAW's remedies have been held adequate in a wide variety of cases. *See, e.g., Battle* v. *Clark Equipment Co., supra*; *Newgent* v. *Modine Mfg. Co.*, 495 F. 2d 919 (7th Cir. 1977). The remedial schemes in the UAW CONSTITUTION and the record here thoroughly demonstrate adequacy.[44] The District Court plainly did not abuse its discretion, or commit clear error in so holding.

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[43] Contrary to Clayton's assertions, internal union tribunals have been uniformly viewed by the courts as an appropriate forum for resolution of claims that a union breached its fair representation duty both in negotiation and administration of a collective bargaining agreement. *See, e.g., Battle* v. *Clark Equipment Co.*, 579 F.2d 1338, 1343-1344 (7th Cir. 1978) (negotiation); *Keppard* v. *International Harvester Co.*, 581 F.2d 764 (9th Cir. 1978) (grievance handling); *Brady* v. *Trans World Airlines*, 401 F.2d 87, 104 (3rd Cir. 1968) (grievance handling); *Neal* v. *System Board of Adjustment, supra* (negotiation and administration of agreement). In particular, in cases such as *Brady, supra*, the fairness and adequacy with which a union handles a member's grievance has been characterized as the epitome of union-employee issues, rather than employer-union-employee issues or general public issues. Not even allegations of racial discrimination have been viewed as sufficient to generally excuse exhaustion of internal union remedies, *see, Neal* v. *System Board of Adjustment, supra*, 348 F.2d at 726-27.

[44] Clayton argues that the UAW's remedies are facially inadequate because they cannot guarantee a remedy within four months. Clayton's Brief at 24-28. This is premised upon, and supplements his contention that the lower courts should be denied *all* discretion on this issue, and that, once the inflexible four months has passed, the merits must be tried in federal court. The short answer is that, since Clayton never made *any* internal appeal, the issue cannot be

The second excuse is futility. The UAW's remedies cannot be described as "futile". Generally, a remedy is held to be futile because it is controlled or dominated by the same, allegedly hostile people who the aggrieved employee claims caused the injury. *See, e.g., Glover* v. *St. Louis-San Francisco Ry. Co.*, 393 U.S. 324, 330 (1969); *Varra, supra*; *Willetts* v. *Ford Motor Co.*, 583 F. 2d 852 (6th Cir. 1978). Specific proof of actual animus is normally held to be necessary. Otherwise, the same general allegations of union hostility, typically pled to claim a breach of the duty of fair representation, would automatically suffice to avoid the exhaustion prerequisite, making the requirement nugatory.

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raised on this record, except by speculation. *Any* time limit would defeat Clayton.

In any event, Clayton's guesses are wrong. He admits that an I.E.B. decision comes in 105 days, *or less*. Clayton's Brief at 25. But, more generally, *whatever* the filing deadlines, any appellate procedure is necessarily at the mercy of how fast the parties do their part. *E.g.*, if Clayton were himself to file on day #2, rather than day #30 of a 30-day appeal period, the process would be shortened by 28 days. The same point applies, with cumulative effect, at each step.

As for the P.R.B., it sets its own schedule and hearings. A principal value of the P.R.B. is its *independence*. A rigid time limit, rather than trial court discretion, would strongly discourage such independence, and likely be at its direct expense.

The C.A.C. meets every six months, hearing all cases appealed to it during that period, for the practical reason that it consists of Delegates from all over the United States and Canada. The difficulty and expense of bringing them all to Detroit makes that schedule reasonable. Moreover, it is the appellant who elects to appeal to the C.A.C. instead of its alternative, the P.R.B. In any event, six months is an *outside* limit. There is an equal probability that an appeal will get docketed just before the next scheduled session.

Finally, the more due process you guarantee, the more delay is possible. The UAW's procedure is laced with due process and is therefore all the more susceptible to *litigant-generated* due process delays. Taking away lower court discretion by fixing an automatic limit would be at the expense of due process, perhaps in the hard cases which need it most.

In *Republic Steel Corp.* v. *Maddox*, *supra*, 379 U.S. at 653, this Court observed: "It cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so." The same applies with equal force to a union's justice system. As the Court below concluded, Clayton should not be heard to speculate in a vacuum, why procedures he *completely* failed to use might not have provided him with whatever relief (he now alleges) would be required *were* he to establish unfair representation *and* a contract violation.

The District Court correctly found that Clayton failed to exhaust the UAW's fair and adequate remedies, and indeed wholly failed to even invoke them.

CONCLUSION

For the foregoing reasons, the Court should *affirm* that portion of the judgment below in favor of the UAW and its Local 509.

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Nos. 80-5049 and 80-54

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CLIFFORD E. CLAYTON, *Petitioner,*

v.

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Respondents.

ITT GILFILLAN, ETC., *Petitioner,*

v.

CLIFFORD E. CLAYTON, *Respondent.*

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER CLAYTON

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REPLY BRIEF FOR PETITIONER CLAYTON

In this brief Petitioner Clayton replies to the briefs for Petitioner ITT (ITT Br.) and Respondent UAW (UAW Br.). Space limitations do not permit making answer to the briefs of the Amici Curiae.

STATEMENT OF THE CASE

The reference by UAW to the charges on which Clayton was discharged and the propriety of the UAW action in not arbitrating the grievance (UAW Br. pp. 2-3) are as superfluous as they are gratuitous. The only aspect of this action which was tried to the District Court, the only issue taken to the Court of Appeals and the only is-

sue here, is that dealing with exhaustion of the UAW internal remedies.

I. The Policy Considerations Supporting Clayton's Vindication of the Public Rights and Duties Involved in This § 301 Proceeding Outweigh Those Favoring Labor Arbitration and Exhaustion of Internal Union Remedies.

Clayton seeks "judicial enforcement of his contractual rights" (*Vaca*, 386 U.S. at 185-186) upon the claim that UAW's breach of duty frustrated the arbitration procedure under the collective agreement. He pursues the remedy fashioned in *Vaca* as a substitute for arbitration so as to afford him the hearing he should have had, and now cannot have, in arbitration. He does not "sidestep available grievance procedures in favor of a lawsuit". (UAW Br. 13.) It is the conduct of UAW, not Clayton, that has led the dispute away from arbitration, the common law of the shop and industrial self-government. (See UAW Br. 11-12.)

Clayton's claim does not deal with "purely private contract rights" (UAW Br. 14, n. 36); it is based upon a statutorily declared public right to obtain, and public duty to afford, fair representation to a member of the bargaining unit. He seeks the *Vaca* remedy which is founded upon and designed to enforce the duty of the bargaining agent defined in 29 U.S.C. §159(a). *Humphrey v. Moore*, 375 U.S. 335 (1964); *Steele v. Louisville N.R. Co.*, 323 U.S. 192 (1944).

UAW and ITT urge policies of minimizing judicial intrusion into "industrial self-government" (UAW Br. 15) and of favoring "private dispute resolution" (ITT Br. 22) to make exhaustion mandatory upon the courts in all

§301 actions such as this. The nature of the rights and duties involved requires that before exhaustion be imposed it be shown that the internal remedy is adequate to afford the wronged employee that which he would have had but for the union's breach of duty to him, *i.e.*, his contractual rights.[1] Exhaustion may not, consistent with the national labor policy "relegate an employee to internal union proceedings which cannot provide . . . the relief he seeks". *Chambers v. Local Union No. 639*, 578 F.2d 375, 386 (C.A. D.C., 1978); *Geddes v. Chrysler Corp.*, 608 F.2d 261, 264 (C.A. 6, 1979); *Frederickson v. System Federation*, 436 F.2d 764, 768 (C.A. 9, 1970). Adequacy here means a tribunal whose decision can result in either reinstatement of the employee or reactivation of his grievance. Anything less elevates the objectives of exhaustion to the point of seriously delaying or denying altogether to the aggrieved employee his *Vaca* remedy.

Brady v. Trans World Airlines, Inc., 401 F.2d 87, 104 (C.A. 3, 1968), held that where the grievance involves the employee-employer relationship, the exhaustion doctrine is inapplicable altogether. That policy should be adopted here. In claiming that *Brady* stands for imposing exhaustion, UAW (Br. 16-17) and ITT (Br. 21) miscite the holding. (See Pet. Op. Br. 36, n. 16.)

Of the cases cited by UAW and ITT in support of an

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[1] Where the internal remedy is deficient in this respect, the aggrieved employee is not required even to initiate the union procedures, for to do so would be an idle act. *Chambers v. Local Union No. 639*, 578 F.2d 375, 386 (C.A. D.C., 1978); *Frederickson v. System Federation No. 114*, 436 F.2d 764, 768-769 (C.A. 9, 1970); *Fruit and Vegetable Packers and Warehousemen's Local 70 v. Morley*, 378 F.2d 738, 745 (C.A. 9, 1967); *Yeager v. C. Schmidt and Sons, Inc.*, 355 F.Supp. 332, 334 (E.D. Pa., 1973).

inflexibly mandatory exhaustion requirement, seven[2] dealt with discharge or some other action where to make the employee whole would require employer action such as reinstatement. In these, non-exhaustion was held a bar to the employee's lawsuit without any analysis of the adequacy of the remedy or the considerations raised in Points III, IV and V of Clayton's Opening Brief. These decisions are not helpful in deciding the issues here. In nine other cases[3] the grievance was remediable with money only and thus presumably within the power of the union adequately to cure. Of these, four[4] explicitly found the union remedy adequate and imposed exhaustion as jurisdictional. Five[5] similarly imposed exhaustion without adequacy having been raised. While the analysis in these opinions is rather thin on the adequacy issue, the approach is clearly one of imposing exhaustion only where the union remedy is adequate to afford the relief sought.

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[2] *Neal v. System Board*, 348 F.2d 722 (C.A. 8, 1965); *Willetts v. Ford Motor Co.*, 583 F.2d 852 (C.A. 6, 1978); *Sherba v. IBT*, 191 L.R.R.M. 2582 (N.D. Ohio, 1979); *Anderson v. Grocers Supply, Inc.*, 483 F.Supp. 73 (S.D. Tex., 1979); *Rehm v. Quaker Oats Co.*, 478 F.Supp. 619 (M.D. Pa., 1979); *Neiger v. Sheet Metal Workers International*, 470 F.Supp. 622 (W.D. Mo., 1979); *Miller v. Local 50*, 468 F.Supp. 193 (D. Neb., 1979).

[3] *Buzzard v. Local Lodge 1040, IAMAU*, 480 F.2d 35 (C.A. 9, 1973); *Battle v. Clark Equipment Co.*, 579 F.2d 1338 (C.A. 7, 1978); *Imel v. Zohn Manufacturing Co.*, 481 F.2d 181 (C.A. 10, 1973); *Keppard v. International Harvester*, 581 F.2d 764 (C.A. 9, 1978); *Rainey v. Missouri Utilities Co.*, 596 F.2d 310 (C.A. 8, 1979); *Aldridge v. Ludwig-Honold Mfg. Co.*, 385 F.Supp. 695 (E.D. Pa., 1974); *Kobielnik v. IBT*, 470 F.Supp. 125 (E.D. Pa., 1979); *Pawlak v. IBT*, 444 F.Supp. 807 (M.D. Pa., 1977); *Provencal v. Allegheny Airlines, Inc.*, 383 F.Supp. 159 (D. R.I., 1974).

[4] *Battle, Buzzard, Kobielnik, Pawlak.*

[5] *Imel, Keppard, Aldridge, Rainey* and *Willetts.*

Assuming *arguendo* that adequate relief for Clayton here does not require reinstatement (which is obviously beyond the union's power) and that money damages are an adequate substitute for a job in the case of a Black worker having eight and one-half years of seniority, the UAW tribunals are legally and jurisdictionally incompetent to award money damages until after a judicial determination. Whether the "requisite elements" of breach of duty of fair representation "have been proved is a matter of federal law". *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 299 (1971). The UAW tribunals have no jurisdiction to pass on questions of federal law. The thought that such a question could be finally determined by a union body thrusts at the very foundation of federal labor law constructed under §301 pursuant to *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957). To require that, despite this legal incompetency, the union tribunals must hold their hearings and reach their decisions before the employee may resort to the courts is to impose upon the discharged employee a heavy burden of duplicative litigation.

As a functional matter, the UAW tribunals can fashion no remedy enforcing Clayton's "contractual rights" (*Vaca*, 386 U.S. at 185-186); those rights run against ITT and the UAW tribunals have no jurisdiction over ITT. Only the courts have. Clayton must prove to a court that UAW breached its duty of fair representation and that ITT breached the collective agreement.[6] Any determination on those issues made by a UAW tribunal would have

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[6] Whether the union has any liability to Clayton for its breach of duty separate from liability for "increases" as defined in *Vaca* (386 U.S. at 197-198) is a question not reached here. See *Kaiser v. Local 83*, 577 F.2d 642, 644-645 (C.A. 9, 1978), and compare with *Czosek v. O'Mara*, 397 U.S. 25, 29-30 (1970).

no legal effect in that judicial proceeding. To require resort to the union remedy before proceeding in court is to delay his pursuit of an effective remedy without serving any end consistent with federal labor law.

The benefits claimed by UAW and ITT for the exhaustion requirement are as miniscule as they are speculative. The union's self-reversal for "misconduct of union officials" (UAW Br. p. 17) would not restore Clayton to his job. If exhaustion might convince the employee of the propriety of the union's conduct (UAW Br. p. 17) and thus prevent him from burdening the judicial processes with his suit, a similar salutary result could occur from pre-filing investigation by competent counsel, and discovery proceedings, a stage when the burden on the courts is minimal. UAW does not explicate the extent to which the "factual and contractual picture may well be clarified" (UAW Br. p. 17), but in the employee-employer relationship the factual and contractual issues are not arcane or complex. Interpretation and application of collective bargaining contracts were purposely entrusted to the courts under §301 as part of national labor policy. *Motor Coach Employees v. Lockridge*, 403 U.S. at 300. If the case implicates, at the breach of contract stage, the common law of the shop, it was the conduct of the union that prevented such issues from being tried to the arbitrator.

The consideration that exhaustion promotes union democracy and self-government (UAW Br. p. 18) is not impressive. The ability of the wronged member of the bargaining unit to obtain effective relief is the most productive stimulant to union rectification of its own errors. The policy of enforcing fair representation and preventing the "injustice" (*Vaca*, 386 U.S. at 185-186) of leaving an unfairly represented employee without remedy, in

the circumstances of this case, is of far greater moment to the federal labor policy than the policy of preserving "union autonomy". *Semancik v. United Mine Workers*, 466 F.2d 144, 151 (C.A. 3, 1972).

II. Judicial Discretion Should be Exercised Against Requiring Exhaustion Where the Union Fails in its Burden of Proving That an Effective Remedy is Available Within Four Months.

It is by now settled that the courts have discretion whether to require exhaustion (*NLRB v. Marine Shipbuilding Workers*, 391 U.S. 418 (1968)), and that the "ordinary rule" of exhausting administrative remedies will not be required in actions of this kind. *Czosek v. O'Mara*, 397 U.S. at 27-28. §411(a)(4) applies to any action in any court by the union member. See *Chambers v. Local Unon No. 639*, 578 F.2d 375, 385, n. 12 (C.A., D.C., 1978); *Wigglesworth v. Teamsters Local Union No. 592*, 552 F.2d 1027, 1029, 1031-1032 (C.A. 4, 1976), *cert. den.* 431 U.S. 955; *Ross v. International Bro. of Electric Workers*, 544 F.2d 1022, 1024 (C.A. 9, 1976); *Operating Engineers Local No. 3 v. Burroughs*, 417 F.2d 370, 373 (C.A. 9, 1969).

There remains the question of whether the employee may ignore the union remedy if it fails to give assurance of resulting in an effective remedy within four months or whether he must pursue it for that period whether or not he can achieve a decision in that time. The former alternative is plainly more reasonable. The general rubric against compelling the performance of idle acts[7] applies

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[7] For application of the idle act concept to dispense with the need to resort to a union remedy incapable of affording the relief sought, see note 1, *ante*.

with special force to a discharged worker confronting his union and his employer.

The cases support this proposition. The construction of the statute in *Detroy v. American Guild of Variety Artists*, 286 F.2d 75 (C.A. 2, 1961), strongly indicates that the remedy must be capable of producting an effective result within four months.[8] In *Harris v. Int'l Longshoremen's Assoc.*, 321 F.2d 801, 805-806 (C.A. 3, 1963), exhaustion was required because the employee could take his complaint directly to the highest body of the union and get a prompt and final decision. The court stated that it would not promote the statutory purpose to require a member to pursue a union remedy "which could not by its very nature result in a decision" within the four-month period. (*Idem.*) In *Jenkins v. General Motors Corp.*, 364 F.Supp. 302, 308 (D. Del., 1973), the court held that the employee had the option of pursuing the union remedy for four months or showing that the "remedies would be unlikely to produce a decision within a four-month period . . ."

Here the record is replete with evidence that no effective remedy was likely in four months. There are in evidence only two PRB decisions; they award back pay and are dated, respectively, four years and two months, and one year and three months after the incidents complained of. (Pet. Op. Br. pp. 7-8.) In his Opening Brief (pp. 6-7, 25), Petitioner analyzed from the face of the UAW constitution the time periods involved in each stage of the appeal. It is Petitioner's position that the con-

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[8] "Congress has provided a safeguard against abuse by a union of the freedom thus granted it [to settle internal disputes in-house and to exercise corrective action in the interests of judicial economy] by not requiring exhaustion of union remedies if the procedures will exceed four months in duration." (286 F.2d at 79.)

stitution demonstrates that it would have taken Petitioner "at least 105 days" (not "105 days or less" as UAW asserts, Br. p. 20, n. 44) to get to the PRB.[9]

But this computation is subject to considerable lengthening. The IEB is to use only its "best efforts" to decide the appeal to it within 60 days of its receipt by the president. (Jt. Ex. B, Art. 33, §7(c); A. 73.) Nothing in the evidence assures that those efforts will succeed. The president has unlimited discretion to decide appeals himself and without any time constraint whatever.[10] (See Pet. Op. Br. p. 7.) There is no time constraint upon the PRB. (*Idem.*)[11]

The experience of other employees as reported in the decided cases indicates that Clayton's computation of the time required is indeed conservative. In *Ruzicka v. General Motors Corp.*, 523 F.2d 306, 312 (C.A. 6, 1975), the employee had fruitlessly pursued his remedy for 27

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[9] Petitioner's analysis is significantly corroborated by the statement of PRB counsel that the UAW appeals structure is "designed to . . . provide a final adjudication . . . within . . . approximately nine months to a year". (See Pet. Op. Br. pp. 25-26, n. 13.)

[10] ITT contends that the president can expedite the appeal by deciding it himself. (ITT Br. pp. 4, 25.) Nothing in the UAW constitution (Jt. Ex. B., Art. 33; A. 69 to A. 77) contains any reference to expedition of appeal by the president. He is simply authorized to decide appeals himself when he deems it "appropriate". (See Pet. Op. Br. p. 7.)

[11] The trial court and the Court of Appeals were right in regarding the PRB decision as the operative one (623 F.2d at 567; TR. 402/18 to TR. 403/2), because the only evidence offered pertaining to decisions by a UAW tribunal was the two PRB decisions referred to above and further because the constitution makes its determinations final. (Jt. Ex. B, Art. 33, §11; A. 76.) An appeal lies alternatively to the CCAC rather than the PRB. The time required to get to the CCAC is the same as that for getting to the PRB. (See Pet. Op. Br. pp. 6-7.)

months, and in *Maxwell v. UAW*, 489 F.Supp. 745, 749 (C.D. Ill., 1980), the same fruitless pursuit had occurred over 17 months. The court in Maxwell was prompted to observe that "the intra-union remedies here do not meet the 'reasonable' and 'four months durational' limitations of §411(a)(4)". (489 F.Supp. at p. 750, n. 5.)

UAW has the burden of proving adequacy of its own remedy, whether that be the ability of its procedures to award the relief sought (*Fruit and Vegetable Packers*, 378 F.2d at 745; *Yeager*, 355 F.Supp. at 334) or to render an effective decision within four months. The facts pertaining to the time expended from original filing to PRB decision are peculiarly within the knowledge of UAW and not known to Clayton, a rank-and-file worker thousands of miles from UAW headquarters. On considerations of fairness the burden of persuasion will be placed on UAW. (*United States v. N.Y., N.H. and H. R. Co.*, 355 U.S. 253, 256, n. 5 (1957); *Browzin v. Catholic University*, 527 F.2d 843 (C.A., D.C., 1975); *Nader v. Allegheny Airlines, Inc.*, 512 F.2d 527, 538 (C.A. D.C., 1975), *rev'd* on other grounds 426 U.S. 290 (1976).) Moreover, UAW pleaded exhaustion as an affirmative defense (A. 18). This, too, places the burden of persuasion on UAW. (*Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 589 (C.A. 1, 1979), *cert. den.* 444 U.S. 186 (1980); *Niccum v. Farmers Coop. Elevator Co.*, 457 F.2d 453, 455 (C.A. 8, 1972); *Marcum v. United States*, 452 F.2d 36, 39 (C.A. 5, 1971).)

III. To Construe the ITT-UAW Agreement to Contain a Commitment to Arbitrate Grievances After Withdrawal by the Bargaining Agent Contravenes the Contract Terms and the Plain Intent of the Parties.

ITT (Br. pp. 33-35) urges an imputed intent to the parties to the collective agreement to reactivate grievances

withdrawn from arbitration when the union tribunal finds the withdrawal to have been a breach of its duty to the employee. This imputation rests upon the employer's presumed knowledge of the union's internal procedures and the awareness of both parties of the federal labor policy favoring arbitration and exhaustion, taken together with the failure of the parties to employ explicit language negativing reactivation.

But here there is uncontradicted evidence that ITT and UAW had an intent not to reactivate such grievances. At trial, it was stipulated that upon the union's withdrawal in this case "it was the end of the road so far as remedies under the contract were concerned". (RT p. 108/19 to 109/7.) Counsel for ITT stated that under the collective agreement the employer had "no obligation whatever" to "reopen the arbitration proceeding" in the event that the UAW appeal went favorably to Clayton's claim of breach of duty. (RT p. 260/17-19.) This evidence taken with the absence of any provision in the collective agreement referring directly or indirectly to reactivation (Jt. Ex. A, Art. IX; A. 35-A. 36) compels the conclusion that ITT has only now discovered this "intent to reactivate".

ITT's position rests upon a distortion and misapplication of *Nolde Bros., Inc. v. Bakery Workers*, 430 U.S. 243 (1977). In that case the Court was required to interpret the scope of an ambiguous arbitration clause. The issue was whether an agreement to arbitrate grievances arising under the collective agreement encompassed disputes arising after its termination but concerning rights which came into being under the contract during its term. As an aid in the task of interpretation and as a means of determining the intent of the parties, the Court presumed that the parties had in mind well-established national labor policy favoring arbitration and requiring that an arbitra-

tion clause be given the broadest scope possible consistent with its actual language. The arbitration clause in *Nolde* spoke of any grievance arising under the contract, and did not specifically negate arbitration of grievances arising under the contract but after its termination. The Court concluded that, in the absence of such specific negation, the parties intended to arbitrate all grievances arising out of the contractual relationship. (430 U.S. at 254, 255.) ITT's contention here, however, requires not the interpretation of an ambiguous provision but the addition to the contract of something that is not there. Under the collective agreement as explicated in the stipulation of the parties referred to above, a grievance withdrawn from arbitration is like a grievance in which arbitration has never been requested. Such a grievance is defunct, dead, *by agreement of the parties.* It is quite unlike the grievance in *Nolde*, which had arisen under the contract and had never been abandoned or otherwise disposed of in accordance with the agreement of the parties.

In *Nolde*, as in *Wiley v. Livingston*, 376 U.S. 543 (1964), the grievance had not been disposed of and only a factor external to the parties' bargaining process impinged upon the employer's obligation to arbitrate it. The Court in those cases interpreted the contract to be unaffected by the external factor. There is no such external factor here. The Court would have to insert in the contract a new clause on the reactivation of abandoned, defunct grievances, giving a new and different result to the parties' bargaining process. In *Nolde* and *Wiley* there was a simple problem of ascertaining the parties' bargain. Here the question is whether to impose a duty to reactivate grievances earlier disposed of, notwithstanding an agreement providing that prior disposition was final. Nor is the reactivation problem merely "procedural" to be decided by an arbitrator. It goes to whether there was an agree-

ment to arbitrate a previously withdrawn grievance, an issue which must be decided by a court. (*United Steel Workers v. Warrior and Gulf Navigation Corp.*, 363 U.S. 574, 582 (1960).) There is no such agreement on the face of the contract. The evidence of intent reviewed at length above shows that the parties specifically intended not to reactivate grievances that had been withdrawn. To attribute to them any other intent is to substitute a court-fashioned agreement for the parties' bargain.

An additional factor bearing upon the parties' intent is the legal position of the employer. Under *Vaca* it is part of the employer's defense to this type of action that the union did not breach its duty of fair representation. (386 U.S. at 186.) It would take an explicit renunciation of that right to attribute to the employer a willingness to surrender that defense by reactivating a grievance that had been abandoned. (*Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 283 (1956); *NLRB v. Wisconsin Aluminum Foundry Co.*, 440 F.2d 393, 399 (C.A. 7, 1971).)

IV. The UAW is Not an Indispensable Party. The Court of Appeals was Correct in Permitting Clayton to Pursue His Discrete Claim Against ITT Alone.

While *Vaca* held that to pursue his claim against the employer for breach of the collective agreement the employee must prove that his bargaining agent has failed to represent him fairly in handling his grievance (386 U.S. at 186), it also recognized that the employee was free to proceed against the employer in a separate action and prove both elements of his case therein. Whether the union is joined or not, "the situation is not substantially changed". (386 U.S. at 186-187.) The union's breach of duty in failing to press the grievance and the employer's breach of contract are "unrelated". (386 U.S. at 197.) Neither the union nor the employer is liable to the em-

ployee for loss caused by the other; the total loss of the employee is to be apportioned between union and employer according to the fault of each, with the union responsible only for the "increases, if any" occasioned by its failure to press the grievance. (386 U.S. at 197-198.)

In *Czosek v. O'Mara*, 397 U.S. 25 (1970), the claim of the employees against the union for breach of the duty of fair representation was held to be a claim discrete from their remedy against the employer. (397 U.S. at 28.) On the authority of *Vaca*, the union in *Czosek* could not claim prejudice if "separate actions are brought against it and the employer for the portion of the total damages caused by each". (397 U.S. at 29.)

These principles have been applied in the Courts of Appeals. In *De Arroyo v. Sindicato Etc.*, 425 F.2d 281, 286-287 (C.A. 1, 1970), in analyzing, for statute of limitations purposes, the nature of the employee's claim against the union for failure of fair representation, the court observed that under *Vaca* and *Czosek* the employee can sue his employer separately under §301 and there show the union's breach of duty. *Kaiser v. Local No. 83*, 577 F.2d 642 (C.A. 9, 1978), held that the dismissed employer was not an indispensable party to the employee's action against the union; the court's reasoning was that neither the employer nor the union was an indispensable party to the employee's claim against the other. (577 F.2d at 644). The employee's action against the employer and his action against the union were said to be "separate and distinct". (577 F.2d at 645.) On the authority of *Vaca*, the court specifically held that the union could be liable to the employee for breach of its duty to represent him fairly even where the employer is not liable for breach of contract. (*Idem.*)

In cases closer on their facts to the case at bar the courts have held that where the employee's claim against the union had been dismissed, the employee could still proceed on his independent claim of contract breach against the employer. (*Harrison v. Chrysler Corp.*, 558 F.2d 1273 (C.A. 7, 1977); *Fizer v. Safeway Stores, Inc.*, 586 F.2d 182 (C.A. 10, 1978); *Winter v. Local Union No. 639*, 569 F.2d 146 (C.A., D.C., 1978).

In these lights, then, there is no occasion to invoke Civil Rule 19. Clayton can get "complete relief" on his claim that ITT breached the collective agreement. His claim against UAW rests upon its separate and independent conduct. The trial of the claim against ITT involves no "interest" of UAW, and the disposition of it will not "impair or impede" the ability of UAW to protect its interests. For no interest of the UAW in the alleged breach of contract by the employer would in any sense be determined or abridged by a decision of Clayton's claim in that respect. Whether in the interests of judicial economy the claims against ITT and UAW, if asserted in separate actions, should be consolidated is a question not reached here.

Contrary to the assertions of ITT (Br. p. 23), Clayton's claims against it and the UAW cannot be analogized to a tort victim's claims against a servant and his master or against a tortfeasor and his insurer. In such cases there is a single set of operative facts and the liability of the master or the insurer grows out of his relation to the actor. Here there are two separate and distinct sets of operative facts and two separate entities acting independently of each other. (See *Czosek, supra.*)

CONCLUSION

The policy considerations urged by UAW and ITT present so formidable an obstacle to the discharged employee's access to his §301 action as to render it virtually inaccessible. The remedy these parties would have him exhaust offers no viable alternative to this judicial remedy to enforce the employee's contractual rights; the union procedures lack the power to enforce those rights, to do so timely and to interpret and apply federal labor law. The disposal of these matters should be as set out in the Conclusion of Petitioner's Opening Brief, p. 39.

Respectfully submitted,
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Nos. 80-5049 & 80-54

IN THE

Supreme Court of the United States

October Term, 1980

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v.

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Respondents.

ITT GILFILLAN,

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v.

CLIFFORD E. CLAYTON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the position of the respondents in this case.

INTEREST OF THE AFL-CIO

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 104 national and international labor organizations representing approximately 13,500,000 employees throughout the United States. The issues in this case are whether an individual who files a hybrid "§ 301 and breach of duty suit" (*Vaca* v. *Sipes,* 386 U.S. 171, 197 n.8) against his union and his employer must exhaust any internal union proceedings designed to correct errors in grievance handling before doing so and, if he must, whether the suit against the employer as well as the union is to be dismissed if he fails to do so. As such, this case concerns a situation at the cross section of several strains of the national labor policy, and is therefore of great importance to the AFL-CIO. For, questions concerning the scope to be given to the grievance-settling mechanism devised by parties to a collective bargaining agreement are involved, as are issues relating to the union's duty fairly to process grievances on behalf of its members, and problems concerning the ability of courts to foster internal union dispute resolution procedures by requiring the use of such procedures when reasonable. It is because of the importance of this case to a variety of problems encountered by labor organizations that the AFL-CIO seeks this opportunity to present its views to the Court.

ISSUES TO BE COVERED

The very complexity of the issues in this case creates a tendency to assume the answers to or give brief analysis of questions which, while perhaps not at center stage in this case, are of great significance to the development of national labor policy generally. These questions should be treated fully by this Court if it becomes necessary to address them as stepping stones to its decision. The brief,

consequently, is not primarily addressed to the outcome of the particular dispute. Rather, we analyze three underlying questions which, should the Court find the need to address them, deserve more careful attention than they may otherwise receive. The questions, and our suggestions as to their resolution, are:

First, whether issues concerning the breach of the statutory duty of fair representation can properly be said to arise at all where a union has not made a final determination whether to pursue grievance-arbitration procedures upon a particular employee's behalf, and the arbitrator chosen by the employer and the union to administer the collective agreement has not determined whether, if the union does pursue the grievance, the agreement provides for or precludes arbitration.

Upon this question, it is our view that the court below much too quickly bypassed the possibility that principles covering the exhaustion of *contractual grievance* remedies, as opposed to *internal union* remedies, govern this case. *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650, read in light of the holding in *Wiley* v. *Livingston,* 376 U.S. 543, that procedural as well as substantive issues should usually be left to the arbitrator, requires, in our view, the result reached below with respect to the union, without reference to any separate analysis concerning exhaustion of internal union procedures.

Second, whether § 101(a)(4) of the LMRDA has any application to this case, either affirmatively, by authorizing court-required exhaustion of a union's system for determining whether a preliminary grievance-handling decision was correct, or negatively, by limiting such authorization to a four-month period.

As we explain, the language and history of § 101(a)(4), as well as relevant policy considerations, suggest that the sec-

tion does not concern the discretion of courts to defer the internal proceedings but, rather, whether *unions* can enforce limitations upon resort to legal remedies. While *Marine Workers* v. *NLRB*, 397 U.S. 418, has within it a passage contrary to this conclusion, that passage was not necessary to the Court's result in that case and should, if the question becomes pertinent, be disavowed.

Third, whether this Court's prior explication of the interaction between suits against unions for breach of the duty of fair representation and suits against employers for breach of a collective agreement under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, requires that employees must have an ongoing breach of duty of fair representation lawsuit against their union in order to litigate their breach of contract claim against the employer.

On this question, *Czosek* v. *O'Mara*, 397 U.S. 25 appears to us to be dispositive. The same factors which led to the conclusion in that case that an action similar to this one may be maintained against the union but not the employer dictate the same result as well in the contrary situation.

CONCLUSION

For the above stated reasons this motion for leave to file a brief amicus curiae should be granted.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 1980

No. 80-5049

CLIFFORD E. CLAYTON,

Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) AND ITS LOCAL 509,

Respondents.

No. 80-54

ITT GILFILLAN,

Petitioner,

v.

CLIFFORD E. CLAYTON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed contingent upon the granting of the foregoing motion for leave to file said brief. The interest of the AFL-CIO in this case is set forth in that motion.

INTRODUCTION AND SUMMARY OF ARGUMENT

The instant case, a hybrid "§ 301 and breach of duty suit" (*Vaca* v. *Sipes,* 386 U.S. 171, 197 n.18), is a three-sided dispute among an employee, his union and his employer. It appears from petitioner Clayton's brief on the merits that he intends to proceed by describing only that portion of the entire problem that directly and immediately affects him, without placing that aspect of the matter into the perspective afforded by the overall national labor policy. Further, the very complexity of the issues creates a tendency to give brief analysis to questions which, while not at center stage in this case, are of significance to the development of that policy generally, and should be fully treated by this Court if it becomes necessary to address them as stepping stones to its decision.

For example, petitioner Clayton asserts that the UAW's internal appeal procedures are inadequate as a matter of law because they "can neither effect his reinstatement nor restore his grievance to the arbitration process." (Brief for Petitioner Clayton (hereafter 'Pet. Br.") at 14.) Clayton then goes on quite eloquently to argue that damages may be an inadequate substitute for reinstatement in one's former position with full seniority. (*Id.,* 17-26.) Yet the question whether the Ninth Circuit's actual holding—that Clayton may continue his lawsuit against the employer, but not against the union—would adequately project whatever interest Clayton may have in reinstatement or in prospective damages is not discussed at all. For, Clayton merely asserts that the UAW's internal appeals procedure is incapable of reviving the collective agreement's grievance-arbitration procedures; the accuracy of that assertion is never explored. Similarly, Clayton contends that "[t]he UAW internal appeal cannot provide a remedy within the four-month period prescribed in 29 U.S.C. § 411(a)(4)

[§ 101(a)(4) of the Labor-Management Reporting and Disclosure Act ("LMRDA")]" (Pet. Br., 26), but gives scant attention to whether that statute is pertinent at all to the exercise of court's discretion to require, in the present context, exhaustion of particular private remedies.

This brief, consequently, is not primarily addressed to the outcome of this particular dispute. Rather, we analyze below three underlying questions which, should the Court find the need to address them, deserve more careful attention than they may otherwise receive. Those questions are:

First, whether issues concerning the breach of the statutory duty of fair representation can properly be said to arise *at all* where a union has not made a final determination as to whether to pursue grievance-arbitration procedures upon a particular employee's behalf, and the arbitrator chosen by the employer and the union to administer the collective agreement has not determined whether, if the union does pursue the grievance, the agreement provides for or precludes arbitration;

Second, whether § 101(a)(4) of the LMRDA has *any* application to this case, either affirmatively, by authorizing court-required exhaustion of a union's system for determining whether a preliminary grievance-handling decision was correct, or negatively, by limiting such authorization to a four-month period; and

Third, whether this Court's prior explication of the interaction between suits against unions for breach of the duty of fair representation and suits against employers for breach of a collective agreement under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, requires that an employee must have an ongoing breach of duty of fair representation lawsuit against his union in order to litigate his breach of contract claim against the employer.

In our view, the proper answer to each of these questions is "No."

As we show in Part I, *infra,* the Court of Appeals much too quickly bypassed the question whether petitioner Clayton in fact exhausted his *contractual grievance* remedies, as opposed to his *internal union* remedies. The exhaustion requirement of *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650, would mandate as a prerequisite to a § 301 suit exhaustion of any remedies chosen by the parties to a collective bargaining agreement, including any opportunity given to one party or the other to reconsider its decision whether to go forward to the next step of the procedure. Plainly, then, in a situation in which there were no time limits in a collective agreement barring reinstitution of a grievance, or where revival of a grievance after internal union reconsideration is expressly permitted, *Maddox* itself would seem to require use of any procedures the union establishes for determining whether it will go forward with a grievance. And even if there *are* time limits in the agreement which appear to bar revival of the grievance, *Wiley* v. *Livingston,* 376 U.S. 543, would seem to establish that the question whether such time limits ought in the circumstances be waived is itself an arbitrable matter.

In Part II, *infra,* we discuss LMRDA § 101(a)(4), noting first that it appears to us to be possible to determine this case without reference to that provision. If, however, the Court does address § 101(a)(4), we submit that it should hold it inapplicable as either an affirmative grant of authority or a limitation thereupon, to deciding whether or when *courts* may, as a matter of sound judicial procedure, decline to intervene in a dispute between a member and his union unless and until any internal union remedies available have been tried. The language and history of § 101(a)(4), as well as sound principles of separation of powers and fed-

eralism, all militate in favor of reading that section in its entirety as pertaining only to union-imposed discipline. While there is a passage in *NLRB* v. *Marine Workers,* 391 U.S. 418, to the contrary, that passage was not necessary to the result in *Marine Workers* and should be disavowed if the problem becomes pertinent.

Finally, in Part III, *infra,* we address the question whether a § 301 action against an employer can be maintained where proof of breach of the duty of fair representation by the union is a pertinent issue, but the union is not being sued for damages as well or has been dismissed as a party. As we show, *Czosek* v. *O'Mara,* 397 U.S. 25, must be read to have decided this issue. For, the same factors which led this Court in that case to conclude that a union may be sued independently in a § 301—breach of duty case require that an employer can also be a lone defendant in such an action.

ARGUMENT

I

Exhaustion of Contractual Remedies

In addressing the problem here, the Court of Appeals assumed that the employee's case against the union turns on the judicial doctrine of exhaustion of *internal union* remedies (623 F.2d 563, 566) and that:

> Here, once the union withdrew its petition for a hearing on his grievance, Clayton lost any opportunity he might have had for reinstatement through the contractual grievance process. Even if Clayton had successfully appealed the withdrawal of the hearing request and the union had reversed itself and found that it should have processed his grievance, the union's public review board could do no more than award him damages for breach of its duty of fair representation. It could neither reinstate Clayton nor reinstate his

> petition and prosecute his grievance action. [*Id.* at 569.]

This approach bypasses far too quickly the threshold issue concerning the application to the instant case of the doctrine of exhaustion of *contractual remedies* stated in *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650. The *Maddox* rule, its statutory base, and the limiting principles relevant here suggest that Clayton has not in fact exhausted his *contractual* remedies because he failed to appeal the union's decision to drop his grievance.

A. *Maddox* holds:

> Unless the contract provides otherwise, there can be no doubt that the employee must afford the union the opportunity to act on his behalf. Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the "common law" of the plant. LMRA § 203(d), 29 U.S.C. § 173(d); § 201(c), 29 U.S.C. § 171(c) (1958 ed.).
>
> A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. It would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. [379 U.S. at 693.]

Both the *Maddox* rule and § 203(d), on which that rule rests, express, in a particular context, "a 'fundamental premise' of the federal labor laws"—*viz.* "freedom of collective bargaining—'private bargaining' under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." (*Howard Johnson Co.* v. *Hotel Employees*, 417 U.S. 249, 254). "It follows" from that premise "that the parties'

agreement primarily determines their relations * * *. If the parties' agreement specifically resolves a particular issue, the courts cannot substitute a different resolution." (*Carbon Fuel Co.* v. *Mine Workers,* 444 U.S. 212, 219.)

To take the situation presented in *Maddox,* no federal law provided for severance pay on the permanent closing of the mine in question. (379 U.S. at 651.) Rather, the "right" to such a payment was stated in a collective agreement, and that agreement provided also for "a three-step grievance procedure to be followed by binding arbitration." *(Id.)* Thus, the agreement did not merely state certain "rights;" it also specified the procedure for vindicating those rights. The courts are required to enforce the latter portion of the contract as well as the former:

> Collective-bargaining contracts * * * generally contain procedures for the settlement of disputes through mutual discussion and arbitration. These provisions are among those which are to be enforced under § 301. Furthermore * * * [the] congressional policy [stated in § 203(d)] "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *Steelworkers* v. *American Mfg. Co.,* 363 U.S. 564, 566 (1960). Courts are not to usurp those functions which collective-bargaining contracts have properly "entrusted to the arbitration tribunal." *Id.,* at 569. [*Hines* v. *Anchor Motor Freight,* 424 U.S. 554, 562-563.]

Hines also restates the limit which federal labor law establishes on the exclusivity of contractual grievance settlement procedures. The Court there noted:

> Because "[t]he collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individ-

> ual employee to the collective interests of all employees in a bargaining unit,'' *Vaca* v. *Sipes,* 386 U.S. 171, 182 (1967), the controlling statutes have long been interpreted as imposing upon the bargaining agent a responsibility equal in scope to its authority, ''the responsibility and duty of fair representation.'' *Humphrey* v. *Moore, supra,* [375 U.S.] at 342. [424 U.S. at 564.]

And *Hines* recognized that:

> Claims of union breach of duty may arise during the life of a contract when individual employees claim wrongful discharge or other improper treatment at the hands of the employer. Contractual remedies, at least in their final stages controlled by union and employer, are normally provided; yet the union may refuse to utilize them or, if it does, assertedly may do so discriminatorily or in bad faith. [*Id.* at 564.]

The rule governing such claims is that:

> The union's breach of duty relieves the employee of an express or implied requirement that disputes be settled through contractual grievance procedures; if it seriously undermines the integrity of the arbitral process the union's breach also removes the bar of the finality provisions of the contract. [*Id.* at 567.]

B. The collective bargaining system established by federal law recognizes the variety of industrial and commercial activity in this society and of the industrial relation systems that activity creates. Congress' ''object'' therefore

> was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective

> bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement. [*Porter Co.* v. *NLRB*, 397 U.S. 99, 103.]

The reliance on the parties' ability to work out solutions to their own problems adapted to their needs as they see those needs extends to solving the problem of how to process and decide contractual grievances. Section 203(d) of the LMRA endorses, without limitation, "Final adjustment [of such grievances] by a method agreed upon by the parties * * *." See, e.g., *Drivers Local Union* v. *Reis & Co.*, 372 U.S. 517, 519. Thus, for example, it is for the parties to decide the number of grievance steps, the identity of the participants at each stage, the formality of the procedures, and so on. One variation on the myriad of possibilities that has been developed is a contractual grievance settlement system providing that when frontline union officials decide not to press a grievance, that decision does not finally dispose of the grievance if the affected employee seeks review within the union according to a procedure developed by the union; only when that review affirms the initial determination is the grievance deemed to be withdrawn. This approach has several virtues.

In *Vaca* v. *Sipes, supra,* the Court noted:

> [T]he individual employee [does not have] an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement. * * * In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration.

Against that background, steps that promote rational

and considered decision making by the union as to whether to press a grievance strengthens the entire system and protects employee rights. The union's position in the grievance machinery established in a collective agreement is the same as that of the NLRB's General Counsel in the administrative scheme put into effect by the NLRA. The General Counsel, as the Court noted in *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, "has adopted certain procedures for processing unfair labor practice charges * * * [i]n order to structure [his] considerable power" (*id* at 139) among which is "[t]he appeals process [which] affords the General Counsel's Office in Washington some opportunity to formulate a coherent policy, and to achieve some measure of uniformity, in enforcing the labor laws." (*Id.* at 141). (See also Davis, *Discretionary Justice* (1969) at 205-206.)

Similar considerations support a union procedure for reviewing initial decisions not to proceed further with a grievance. The views of those removed from the underlying dispute and the initial decision add a dimension of reflective and disinterested appraisal not otherwise obtainable. And, particularly where the contract covers many employees or numerous units, a system of review of initial determinations furthers an ideal noted in *Vaca—viz.*, "that similar complaints will be treated consistently and major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved." (386 U.S. at 191.) That end is particularly likely to be served when the reviewing authority is at a higher level of the organization and considers disputes emanating from several sources. For, the reviewing authority is then able to preceive the entire picture as it develops in a manner not possible for the participants who are actively engaged in composing that picture. Finally, of course, in light of the portion of *Hines* quoted above (stating the union's duty of

fair representation and the consequences of a breach of that duty), the interests of the employer, the union, the employee and the society are furthered by responsible union action designed to prevent such breaches, to maintain the integrity of the parties' choice of a contractual system of grievance settlement, and to preclude the necessity of employee court suits.

C. It follows from the foregoing that the employee's breach of contract claim against the employer is not ripe under *Maddox,* and his duty of fair representation claim against the union (as well as the breach of fair representation prerequisite to his breach of contract claim) are not ripe under *Vaca,* until his grievance has been finally determined against him under the contractual grievance settlement procedure. It is contrary to the policy described in the previous paragraphs for the courts to intervene before the statutory representative has determined, at the highest level at which such decisions can be made under its procedures, not to press the grievance to arbitration.[1]

Thus, where, as appears to be the case here (see, J.A. 102-103), it is open to the employee to seek a decision by higher union officials (or by a Public Review Board as the union's delegate) to proceed with the arbitration, the union has not made a final decision to reject the grievance.[2] An employee who sues prior to such decision has simply failed

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[1] The same analysis is applicable where a decision has been made at a lower level in the union's hierarchy to drop the grievance at some level prior to arbitration, but that decision is subject to reversal at a higher union level.

[2] By the same token, if the contractual grievance procedure provided that the company's final determination concerning its disposition of the grievance is at the level of the Vice President for International Relations, the employee could not sue for breach of contract while it was still open to him to receive a favorable decision from that officer.

to give the union an adequate opportunity to exercise its duty of fair representation and ought not to be heard to contend that the union has breached that duty. Moreover, as long as it is open to the union to seek arbitration, it has not been finally determined under the contractual grievance procedure that the employee has been denied his asserted contract right, so that his § 301 claim against the employer cannot be entertained under *Maddox*. In short, his court actions against the employer and the union are premature.

The foregoing analysis follows directly from, and unquestionably effectuates the policies of the Act as explicated in, *Maddox, Vaca* and *Hines*. Our point is, however, subject to the possible objection that the contractual grievance procedure may contain a time limitation for bringing cases to arbitration which the union has not met in determining on review whether to press the case to arbitration. This difficulty, of course, does not arise where the employer and the union have placed no such time limit in their agreement, or where the contractual grievance procedure expressly contemplates that it would be open to the union to demand arbitration until it has determined, at the highest level, not to do so.[3]

Where, however, the collective agreement does contain a time limit for proceeding to arbitration (or for completing some other steps which have not been accomplished prior to a final union determination not to process the grievance further), it may appear at first glance that it would be futile for the employee to seek a decision at a higher union level to press his grievance, and that his claim has indeed been finally determined against him within the contractually provided system. However, such surface appearances may be illusory. (Cf. *Maddox*, 379 U.S. at 659.)

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[3] Such, for example, is the situation under the contract between the UAW and General Motors.

If the higher union officials determine that the grievance is meritorious, they may ask the employer to waive the contractual time limit and he may choose to do so, thereby permitting the grievance to be resolved internally. In the absence of such waiver, the union may take the position that the contractual time provisions do not bar processing the grievance to and through arbitration. This is clearly a question of contract interpretation for the arbitrator under *Wiley* v. *Livingston*, 376 U.S. 543, 555-559:

> Although a party may resist arbitration once a grievance has arisen, as does Wiley here, we think it best accords with the usual purposes of an arbitration clause and with the policy behind federal labor law to regard procedural disagreements not as separate disputes but as aspects of the dispute which called the the grievance procedures into play.

Thus, even when the collective agreement imposes a definitely stated time limit, it is open to the arbitrator to decide that the parties did not intend that time limit to apply under particular circumstances. For example, it could be appropriate for an arbitrator to conclude that the contract refers to situations in which review within the union is not sought; the collective agreement must be read in conjunction with the union's internal procedure for determining whether to press a grievance, of which the parties must be presumed to have been aware, and with the national labor policy's preference for internal resolution of contractual disputes. "[T]he law of labor agreements cannot be based upon abstract definitions unrelated to the context in which the parties bargained and the basic regulatory scheme underlying that context." (*NLRB* v. *C & C Plywood Corp.*, 385 U.S. 421, 430.) *Wiley* itself is an example in which arbitration of a timeliness issue was directed although previous steps described by the contract had not

been followed. (See 376 U.S. at 555-556. Cf. *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, holding that the courts are not to determine that the merits of a dispute in passing on its arbitrability.)

In sum, until the union has finally determined not to press the grievance, or the arbitrator has ruled against the employee, either because the grievance has been untimely processed or on the merits, the employee can still prevail under the contractual agreement's procedure. And as long as that is possible, he has not exhausted the grievance procedure as *Maddox* and its progeny require as a condition for filing a suit.

II

LMRDA Section 101(a)(4)

Section 101(a)(4) of the LMRDA, 29 U.S.C. § 411(a)(4), states:

> "*Protection of the Right to Sue.*—No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof * * *."

The Court of Appeals perceived in the first proviso of this statute the source of its "[j]udicial discretion to require exhaustion." (623 F.2d at 566, n.2.) Clayton, on the

other hand, views the four-month limitation in the same proviso as an insuperable bar to requiring resort to the UAW's internal procedure: Clayton maintains that it will necessarily take more than four months for the UAW's Public Review Board, the final step in the internal procedure (if the employee so chooses), to decide the case.

A. This case should, we believe, be decided without addressing general questions concerning the scope of § 101(a)(4) at all. For, even if § 101(a)(4) does limit the ability of courts to require, as a matter of sound judicial administration, that members of private organizations must avail themselves of internal remedies before resorting to the courts, it would not, for two reasons, support Clayton's contention.

First, as discussed in Part I, *supra,* this case concerns the tripartite relationship between employers, unions and employees covered by collective agreements. Neither this Court nor any other has suggested that the right of parties to a collective agreement to establish remedies for breach of that agreement is limited to a four-month period, after which an individual employee is entitled to a judicial determination of his or her contractual rights. And, indeed, consistent with the LMRDA's focus on the relationship between unions and their members, the relevant proviso to § 101(a)(4) applies only to hearing procedures "within [a labor] organization." Contractual grievance procedures are not "within" either the union or the employing organization, even if they assign one or more steps of the procedure to one or another of the parties to the contract.

Second, Clayton, of course, did not use the UAW internal procedure at all. This being the case, he is hardly in a position to invoke the protection of the four-month limit once the court has determined to require exhaustion, at least

absent a showing that an effective remedy within that time is impossible. It is true that the time limits in the UAW's Constitution are so set up that a determination by the Public Review Board within four months is not *assured.* (Pet. Br., 27.) It is also true, however, that (a) there has been no showing that an effective remedy at a lower level is an impossibility; as discussed in Part I, *supra,* UAW action *short* of the PRB may determine to attempt reinstitution of the grievance, and that attempt may succeed; and (b) there is no ground upon which to assume that each body to whom Clayton's request for reconsideration of the decision not to go forward with the grievance is presented will take the maximum time permitted to make a determination; the process could well leave the PRB with a month or two to make a decision before the four-month period has elapsed.

B. Since § 101(a)(4) is not directly pertinent to Clayton's case on the facts, that provision and its proper construction should not be addressed. If it is addressed, however, the court should hold that as a matter of law, this provision has no pertinence to the problem whether, or for how long, *courts,* state or federal, may defer court proceedings to await a determination by an internal tribunal. *NLRB* v. *Marine Workers,* 391 U.S. 418, is not the contrary.

In *Marine Workers,* the question was whether a member of a union could be expelled from membership for filing an NLRB charge against his union without exhausting, as the union constitution required, his internal remedies. After finding that the union had violated § 8(b)(1)(A) of the NLRB by infringing upon an employee's right of "unimpeded access to the Board" (*id.* at 424), the Court was faced with deciding whether the exhaustion proviso of LMRDA § 101(a)(4) somehow excused interference with "[t]he [NLRA] policy of keeping people 'completely free

from coercion' [*Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 238] against making complaints to the Board [a freedom which] is * * * important to the functioning of the [NLRA] as an organic whole." (*Id.* at 424.)

The Court refused to read the § 101(a)(4) proviso as modifying not only the prohibition contained in § 101(a)(4) itself, but also entirely separate prohibitions upon interference with free resort to judicial or administrative remedies contained in distinct statutes and central to the policies underlying those statutes. Rather, the Court enforced the NLRA's unqualified prohibition upon union interference with NLRB access of union members despite the LMRDA's qualified permission to unions to require, on pain of discipline, up to four months of internal exhaustion. Specifically, the court held that where a "complaint or grievance *** touches a part of the public domain covered by the [NLRA], failure to resort to any intra-union grievance procedure is not ground for expulsion from a union." (*Marine Workers*, 391 U.S. at 428.) This interpretation of the appropriate interface between the two statutes had specific support in the legislative history of the later of the two acts, the LMRDA, as the Court noted. (*Id.* at 427-428.)

Presumably, *Marine Workers* would control in a case involving an analogous problem under a statute other than the NLRA. Thus, if a union tried to fine, expel or otherwise discipline a member for filing against it a charge with the Equal Employment Opportunity Commission under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e, without exhausting internal remedies for four months, the union would squarely violate a provision of Title VII itself. (Title VII, § 704, 42 U.S.C. § 2000e-3.) In this circumstance, as in *Marine Workers*, we assume that the proviso to LMRDA § 101(a)(4) would not legitimate the union's vio-

lation of a completely separate prohibition from that contained in § 101(a)(4).

On the other hand, the *Marine Workers* situation is quite different from one in which the only statutory prohibition upon union discipline for resorting to a court or agency is § 101(a)(4) itself. In that circumstance, the proviso would appear on its face to apply (see subpart C *infra*), and a union *could* enforce a rule that the individual exercise his or her "right * * * to institute an action in any court, or *** administrative agency" only after exhausting "reasonable" internal union remedies for four months.[4]

There is, it is true, a passage in Justice Douglas' opinion for the Court in *Marine Workers* indicating that the proviso to § 101(a)(4) does not qualify the statutory prohibition, directed only at any "labor organization," upon interfering with members' resort to legal remedies, but instead, "install[ed] in this labor field a regime comparable to that which prevailed in other areas of law before federal courts, which often stay their hands while a litigant seeks administrative relief before the appropriate agency." *Id.* at 426. However, no question concerning court-required exhaustion, as opposed to union-imposed discipline, was before the Court. Nor were Justice Douglas' remarks concerning his belief as to what § 101(a) (4) *might* mean essential to his conclusions as to what the Section does *not* mean. For after *Marine Workers* the § 101(a)(4) proviso *would* have a perfectly sensible application if Justice Douglas' suggestion in that case as to its possible meaning were not

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[4] Section 609 of the LMRDA, 29 U.S.C. § 529, creates a separate cause of action where a union disciplines a member "for exercising any right to which he is entitled under the provisions of this Act." Since this section does not create any rights but simply incorporates those created by other sections of the LMRDA, it does not alter the qualified nature of the right created by § 101(a)(4).

adopted: As we have just demonstrated, the *Marine Workers* result comports perfectly well with the view that while § 101(a)(4) does not forbid all time-limited exhaustion requirements imposed and enforced by a union, neither does it sanction such a requirement if prohibited by another statute. Since, as we now show, Justice Douglas' suggestion is in fact contrary to the statute's language, structure and history as well as to basic principles of federalism and of separation of powers, it ought not to be followed in this case should the scope of § 101(a)(4) become pertinent.

C. The most logical conclusion to be drawn from the bare language and structure of the main sentence of § 101(a)(4) and its first proviso is that the sentences concern whether and under what circumstances unions may *discipline* members who file legal actions against their unions. Section 101(a)(4) is, of course, part of Title I of the LMRDA, the Bill of Rights for union members, which consists of various provisions prescribing what unions may and may not do in the treatment of their members. The main sentence of § 101 (a)(4) itself forbids any "labor organization" from limiting certain legal rights of its members; no prohibition is directed against public courts or agencies. As parts of a proviso, both the right to require exhaustion and the four month limitation upon that right are, logically, *exceptions* which state what the organizations to whom the previous command was directed may do despite that preceding and general restriction upon their action.

This reasoning follows the lead of the decisions of this Court. The office of a proviso is well understood. It is "to except something from the operative effect, or to qualify the generality, of the substantive enactment to *which it is attached.*" *Cox* v. *Hart*, 260 U.S. 427, 435. (Emphasis added.) *Cf. National Labor Relations Board* v. *Servette, Inc.*, 377 U.S. 46: "There is nothing in the legislative history

which suggests that the protection of the proviso [Section 8(b)(4) of the NLRA] was intended to be any narrower in coverage than the prohibition to which it is an exception, and we see no basis for attributing such an incongruous purpose to Congress." The prohibition of Section 101(a)(4) clearly applies to *union-imposed* restrictions. It follows that the exception contained in the proviso must likewise apply to *union-imposed* restrictions. Accordingly, the authorization for a requirement that union members pursue internal remedies for four months must be an authorization for such a requirement when imposed by *unions*. The four-month limitation, in turn, qualifies that authorization.

To instead read § 101(a)(4) as limiting *courts* in their handling of suits by union members not only violates settled principles of statutory construction but, as well, creates two serious policy problems. The first of these problems relates to the separation of powers between the legislative and judicial branches of government. The construction of § 101(a)(4) suggested by petitioner Clayton would require both federal and state courts to hear a case four months after the cause of action arises, even though the legal questions might turn on complicated and arcane rules relating to the purely fraternal aspects of the association, and even though the union's internal appeal apparatus was sound and fair. In short, it would require the court to act even though the case is clearly not ripe for adjudication, so that sound principles of judicial administration and economy would dictate otherwise. If the exhaustion of remedies rule has been modified by § 101(a)(4) to allow the courts to permit only four months of exhaustion, then that section must mean that they can never under any circumstances refuse to hear a case after that period has elapsed. Such a direction from Congress

to the courts would, of course, trench on the traditional powers of the latter. "One cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of such intent would have been made." *Hecht Co.* v. *Bowles,* 321 U.S. 321, 329.

That conclusion is buttressed by considerations of federalism. Suits against labor organizations may be filed, of course, in state as well as federal court. It is unlikely that Congress, in the LMRDA, undertook the sensitive task of regulating state court procedure in cases which may arise entirely under state law, without giving a clear indication of its intent to do so. Yet, there is no such indication in the language or legislative history of § 101(a)(4).

With this background in mind, we turn briefly to the legislative history. That history shows, first, that the § 101 (a)(4) proviso *was* in fact intended to serve the usual purpose of a proviso. That is, it is a limited *qualification* upon the prohibition contained in the main sentence, so that it permits union disciplinary action if union-imposed exhaustion requirements are not met.

The present § 101(a)(4), including the proviso, is with one exception exactly the same as § 101(a)(4) of S. 1555, 86th Cong., 1st Sess., as it passed the Senate. See 1 Legislative History of the Labor Management Reporting and Disclosure Act of 1959, p. 520 (G.P.O. 1959) (hereinafter Leg. Hist. LMRDA.) That exception is that S. 1555 allowed for six months of exhaustion while the LMRDA allows for only four months. Both Senator Goldwater and Representative Griffin critized the six-month time limit in S. 1555 on the ground that while the union rules it allowed, if observed, would ordinarily only delay access to the *courts,* it would enable a union, in effect, to bar a member from filing

charges with the *NLRB,* since that statute of limitations under the NLRA is also six months. Said Senator Goldwater:

> "If, in order to be eligible for the protection of his right to sue under this provision of the bill of rights, a union member must wait 6 months while exhausting his internal union hearing procedures, he finds that the NLRB will refuse to process his unfair labor practice charge because the Taft-Hartley Act's 6-month time limitation on the filing of charges has run out. On the other hand, if having failed to exhaust his union hearing procedures, he fails to wait the required 6 months and files his charge with the NLRB in order to escape the Taft-Hartley time limitation, he loses the protection of the right to sue provision of the bill of rights, and the union, if it wishes *may discipline him for having filed the charge.*" [105 Daily Cong. Rec. 9108 (June 8, 1959), 2 Leg. Hist. LMRDA 1280. (Emphasis added.) *See also* 105 Daily Cong. Rec. 6847 (May 7, 1959), 2 Leg. Hist. LMRDA 1270 (Sen. Goldwater).][5]

Indeed, since, as Congress was made aware (see, e.g., 105 Daily Cong. Rec. 14495 (Aug. 13, 1959), 2 Leg. Hist. LMRDA 1667 (Rep. McCormack)), the NLRB did not apply an exhaustion of remedies rule, the great congressional concern with assuring access to the Board, and the action taken based on that concern, make sense only if the proviso *does* apply to union disciplinary action in some circumstances.[6]

[5] The Landrum-Griffin bill, H.R. 8400, 86th Cong., 1st Sess., in a provision identical to Section 101(a)(4) of the LMRDA as passed, met this criticism by reducing the time period from six months to four. See 105 Daily Cong. Rec. 13089 (July 27, 1959), 2 Leg. Hist. LMRDA 1520 (Rep. Griffin). *See also* 105 Daily Cong. Rec. 14193-14194 (Aug. 11, 1959), 2 Leg. Hist. LMRDA 1566-1567 (Rep. Griffin).

[6] *Marine Workers* held that where "plainly internal affairs of the union are involved" (*id.* at 424), the NLRA would not bar union discipline for invoking the Board's aid.

Second, the legislative history, when read in light of the principle that "[i]t is the sponsors that we look to when the meaning of the statutory word is in doubt" (*Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 384, 394),[7] makes clear that the § 101(a)(4) proviso was *not* intended to infringe upon the ability of courts to apply jurisprudential rules requiring exhaustion of private remedies. For, Senator Kennedy, the Chairman of the Conference Committee which developed the bill in its final form (*see* 105 Daily Cong. Rec. 16428 (Sept. 3, 19593, 2 Leg. Hist. LMRDA 1446) so explained to his colleagues in no uncertain terms:

> The protection of the right to sue provision originated in the Senate bill and was adopted verbatim in the Landrum-Griffin bill except that the first proviso limiting exhaustion of internal hearing procedures was changed from 6 months to 4 months. The basic intent and purpose of the provision was to insure the right of a union member to resort to the courts, administrative agencies, and legislatures without interference or frustration of that right by a labor organization. On the other hand, it was not, and is not, the purpose of the law to eliminate existing grievance procedures established by union constitutions for redress of alleged violation of their internal governing laws. *Nor is it the intent or purpose of the provision to invalidate the considerable body of State and Federal court decisions of many years standing which require, or do not require, the exhaustion of internal remedies prior to*

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[7] As Justice Douglas noted (391 U.S. at 427 & n. 9), several Members of Congress indicated on the floor of the House of Representatives that the proviso did concern the authority of courts to require exhaustion. Representatives McCormack, O'Hara, and Foley, however, were all speaking in *opposition* to the bill when they made the remarks alluded to in *Marine Workers*. "The fears and doubts of the opposition are no authoritative guide to the construction of legislation." *Schwegmann Bros., supra*, 341 U.S. at 394.

court intervention depending upon the reasonableness of such requirements in terms of the facts and circumstances of a particular case. So long as the union member is not prevented *by his union* from restoring to the courts, the intent and purpose of the "right to sue" provision is fulfilled, and any requirements which the court may then impose in terms of pursuing reasonable remedies within the organization to redress violation of his union constitutional rights will not conflict with the statute. The doctrine of exhaustion of reasonable internal union remedies for violation of union laws is just as firmly established as the doctrine of exhausting reasonable administrative agency provisions prior to action by courts.

"*The 4-month limitation in the House bill also relates to restrictions imposed by unions rather than the rules of judicial administration or the action of Government agencies.* For example, the National Labor Relations Board is not prohibited from entertaining charges by a member against a labor organization even though 4 months has not elapsed." [105 Daily Cong. Rec. 16414 (Sept. 3, 1959) 2 Leg. Hist. LMRDA 1432. (emphasis supplied).]

As Senator Kennedy's remarks indicate, § 101(a)(4) was not "*installing* in this labor field a regime comparable to that which prevails [with regard to] . . . administrative relief." *Marine Workers*, 391 U.S. at 426. That "regime" already existed, having been developed by the courts themselves as a matter of their own governance. If § 101(a)(4) were removed as both an authorization for court exhaustion doctrines and a limitation thereon, courts would not lose the ability to give "[r]esponsible union self-government . . . a fair opportunity to function." (*Id.* at 429 (Harlan, J., concurring.) Rather, they would simply have the opportunity to determine for themselves when that "fair opportunity" was completed.

III

Separate Actions Against Employers

The Court of Appeals considered and rejected the employer's argument that there must be a unitary answer to the internal union exhaustion question for suits against the employer and suits against the union:

> Conditioning the employer's use of the internal exhaustion defense on the adequacy of internal union remedies produces an anomaly. Where the employer raises the affirmative defense of failure to exhaust the contract's dispute resolution machinery, and where the employee has failed to exhaust internal union procedures, the employer will be required to defend the union's representation of its members *** We are aware of the anomaly. But we have not been directed to any authority that would permit the employer to escape liability if the trier eventually finds that the employee did not receive the minimum representation his union owed him. [623 F.2d at 570.]

In holding that "the cases compel [this] result" (*id.* at 570), the Court below addressed an issue of some moment beyond the particular circumstances here presented. For, there are many possible situations in which similar problems could arise.

The first, of course, is that in which the injured employee simply declines to sue the union, choosing to forego any damages which may be attributable to the union's breach of its duty of fair representation. A second instance would be that in which a statute of limitations barred suit against a later-joined union, but not against the employer (*see Smart* v. *Ellis Trucking Co., Inc.*, 580 F.2d 215),[8] or in

[8] *Smart* involved a situation in which an employee amended his complaint to add a breach of duty claim against the union sometime after the lawsuit was instituted. At the present time, however, it is not even clear that the *same* statute of limitations always

which some other procedural defense (such as lack of venue or of personal jurisdiction) is available to the union but not the employer. Finally, if the employee *does* choose to sue both entities in a single lawsuit and is able to maintain that suit, the union may choose to settle before trial although the employer is determined to put on its proof.

All of these situations, of course, could arise as well in the opposite way, leaving the union to defend a § 301—breach of duty suit in a case in which the breach of contract action against the employer either was never included or has been dismissed. As this Court has explicated the relationship between the two interrelated issues in such suits, an "anomaly" precisely analogous to that perceived here could be said to arise if the union must defend itself because the employer is not a party. For,

> [T]o prevail against *either* the company or the Union, petitioners must show that their [injury] was contrary to the contract * * * [and] also carry the burden of demonstrating breach of duty by the Union. [*Hines*, 424 U.S. at 570.]

The reasons for this rule are, first, that absent breach of the fair representation duty by the union, the employee's suit against the employer is barred by any failure to exhaust contractual remedies; and, second, that absent a

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applies to both a breach of duty suit against the union and a § 301 suit against the employer; that issue is presently before this Court. *United Parcel Service, Inc.* v. *Mitchell*, No. 80-169. It is our view that any limitations period *should* be unitary, and should mirror the six month period contained in § 10(b) of the NLRA. (See Brief for the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae in *United Parcel Service, supra.*) If our view were adopted in *United Parcel Service*, the statute of limitations problem here alluded to would be limited to a circumstance similar to that in *Smart*.

breach of contract by the employer, the union's breach of the fair representation duty caused the employee no injury because it did not alter the result which would otherwise have obtained. Thus, just as the Company has available to it the defense that the Union has not breached its duty of fair representation, the Union has available to it the defense that it caused no injury to the employee because there was in fact no breach of contract.

Neither of these issues can be said to be primary while the other is secondary. The duty of fair representation question is, in a suit against either party, akin to a jurisdictional question. Yet, the breach of contract issue arises first as a matter of time, and is the question upon which the right to "all or almost all" of the damages depend. (*Vaca, supra,* 386 U.S. at 198).

A union, of course, often will be uncomfortable at being placed in the position of having to prove that the employer did *not* breach the collective agreement. This is particularly true if the union did take the case to arbitration and argue that there *was* a breach. Further, any prospects for collusion which could be alleged to inhere in a suit against the employer alone could equally well be found in a suit against the union alone, particularly since the employer's potential damages, and therefore his incentive to cooperate with the plaintiff, are likely to be considerably greater than that of the union.

But, the question whether a union can be sued for breach of the duty of fair representation even though suit against the employer for breach of contract was never filed or was dismissed is not an open question. In *Czosek* v. *O'Mara,* 397 U.S. 25, the issue whether the "union defendants *** may be sued alone for breach of duty when damage to employees

had its roots in their discharge" (*Id.* at 28) was squarely addressed and decided.[9]

The Court in *Czosek* answered this question in the affirmative. Central to its analysis was the apportionment of damages rules established in *Vaca*,: "The governing principle *** is to apportion liability between the employer and the union according to the fault of each." (*Id.* at 197). Because, under this "governing principle," "judgment against [the union] can in any event be had only for those damages which flowed from their own conduct * * * union defendants will not be materially prejudiced by the possible absence of the [employer] as a codefendant at trial." (*Czosek*, 397 U.S. at 29.) [10]

Since "both the union and the employer have independently caused damage to the employees" (*id.*), the employer is in no better position than the union to "complain if separate actions are brought against it and the employer for the portion of the total damages caused by each." (*Id.*) Thus, as this Court recognized in *Vaca* (although the issue was not squarely before it):

> The wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that the union as bargaining agent breached its duty of fair representation.

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[9] In *Vaca, supra*, the case was in fact against the union alone. (386 U.S. at 173, 197.) While the Court plainly assumed the propriety of such a lawsuit, it did not address the question directly at that time.

[10] The Court viewed as the "damages which flowed from [the union's] conduct" in a wrongful discharge—duty of fair representation case only those costs which the union's "refusal to handle the grievances added to the difficulty and expense of collecting from the employer." *Czosek*, 397 U.S. at 29.

> • • • [T]he jurisdiction of the courts is [not] destroyed by the fact that the employee, as part and parcel of his § 301 action, finds it necessary to prove [a breach of the duty of fair representation]. The court is free to determine whether the employee is barred by the actions of is union representative and, if not, to proceed with the action.

The principle that the two intertwined issues in duty of fair representation—§ 301 suits do not *demand* that all potential defendants be present in one lawsuit was reaffirmed in *Czosek* and should be reaffirmed once again in this case should the question become pertinent.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed, except that, if the theory of Part I, *supra,* is adopted, the judgment should be reversed insofar as it refused to dismiss the action against the employer.

Respectively submitted,

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Nos. 80-54 and 80-5049

In the Supreme Court of the United States

OCTOBER TERM, 1980

ITT GILFILLAN, a Division of International Telephone and Telegraph Corporation, a corporation,
Petitioner,

vs.

CLIFFORD E. CLAYTON,
Respondent.

CLIFFORD E. CLAYTON,
Petitioner,

vs.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, and UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL NO. 509,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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In the Supreme Court of the United States

OCTOBER TERM, 1980

Nos. 80-54 and 80-5049

ITT GILFILLAN, a Division of International Telephone and Telegraph Corporation, a corporation,

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INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, and UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL NO. 509,

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief Amicus Curiae of the Chamber of Commerce of the United States

I.

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America is a federation consisting of over 3,700 state and local chambers of commerce and trade and professional associations, and has a membership in excess of 95,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents its member-employers in important labor relations matters vitally affecting their interests before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation.[1]

This case presents issues that are of importance to the business community, to employers and employees, and to the basic principles of our national labor policy. Large and small employers throughout this Nation will be affected by the Court's decision in this case.

The Chamber, with the consent of all parties, respectfully submits this brief in support petitioner ITT Gilfillan in No. 80-54 and respondent United Auto Workers in No. 80-5049.

II.

PRELIMINARY STATEMENT

A. Statement of the Case

Following termination of his employment for violation of company work rules, Clifford E. Clayton filed a timely

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1. *See, e.g., Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 100 S.Ct. 2844, (1980); *International Bhd. of Teamsters v. Daniel*, 439 U.S. 551 (1979); *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978); *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976); *Connell Construction Co. v. Plumbers and Steamfitters Local 100*, 421 U.S. 616 (1975); *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974).

grievance in accordance with the procedures of the collective bargaining agreement then in effect between his employer, ITT Gilfillan (hereinafter, the "Company"), and his bargaining representative, Local 509, United Auto Workers (hereinafter, the "Union"). (A.22; A.P.1-4)[2] The Union carried the grievance through the third and final step of the grievance procedure and requested arbitration. (A.22, 32-33; A.P.4) On the basis of its own investigation, including interviews of two eye witnesses, the Union later withdrew its request for arbitration and so notified Clayton in writing. (A.22, 78-79; A.P.4-5)

At that point, an internal union appeals procedure was available to Clayton through which he could have challenged the Union's decision not to take his grievance to arbitration. (A.64-77; A.P.5) That procedure gave each member the right to appeal to the general membership of the Local "any action, decision or penalty of [the Local] or of any official or representative of that body. . . ." U.A.W. Constitution, Art. 33, §§ 1-2 (1974). (A.69-70) If not satisfied with the decision of the Local, the member could appeal further to the International Executive Board and ultimately to either the Constitutional Convention Appeals Committee of the International Union or to a Public Review Board. *Id.*, Art. 33, §§ 3-11. (A.70-77)

Clayton was familiar with the Union's appeals procedure and was specifically advised by the Union at the time it decided not to take his grievance to arbitration that he could appeal that decision through these procedures. (A.P. 6-8) Clayton, however, did not attempt to use the appeals procedure. (A.23; A.P.5-6) Instead, some six months later, he brought suit in federal district court against both the Company and the Union. (A.3-10, A.P.4-5; Petitioner Clayton's Opening Brief at 4) Against the Company, he alleged

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2. "A." refers to the Joint Appendix filed herein. "A.P." refers to the Appendix to the Petition for Certiorari filed by ITT (80-54).

that his termination violated the collective bargaining agreement. (A.4) Against the Union, he alleged a breach of the duty of fair representation as a result of the Union's "discriminatorily failing and refusing to protest and grieve [his] wrongful termination. . . ." (A.6)

Both the Company and the Union raised as affirmative defenses Clayton's failure to exhaust his internal union remedies. (A.12, 18) Following trial on this issue, the district court concluded that the internal union procedures could have provided adequate relief, that Clayton's failure to exhaust these available remedies was not excused, and that his action against both the Union and Company was therefore barred. (A.P.14-16)

On appeal, the Ninth Circuit affirmed the dismissal of the Union but reversed the dismissal of the Company. *Clayton v. ITT Gilfillan,* 623 F.2d 563, 571 (9th Cir. 1980). As to each, the court measured the adequacy of the internal union remedies according to the standard of what relief a court could provide. (623 F.2d at 566-67) Since a successful court action against the Union could yield only money damages, a remedy the internal union procedures could provide as well, the court concluded that these procedures were adequate *vis-a-vis* the claims against the Union. (623 F.2d at 566) However, since a successful court action against the Company could yield reinstatement, a remedy the internal union procedures could *not* provide, the court concluded that these procedures were *not* adequate *vis-a-vis* the claims against the Company. (623 F.2d at 567, 569) Accordingly, the court held that Clayton's suit against the Union was barred by his failure to exhaust internal union remedies, whereas his suit against the Company was not. (623 F.2d at 571)

B. Summary of Argument

By narrowly restricting the defense of failure to exhaust intraunion remedies in actions on the collective bargaining

agreement, and by making the defense available to unions but not employers, the court below has adopted a rule that seriously undermines important tenets of our national labor policy and imposes unfair and inequitable burdens upon employers. In place of this unnecessarily restrictive approach, *Amicus* urges the Court to adopt an alternative rule that better serves the national labor policy, avoids unfairness to employers, and provides proper safeguards for the interests of individual employees.

Central to our national labor policy is the private resolution of labor disputes, including claims arising under collective bargaining agreements. Where such disputes involve grievances, this policy also rests on the unique nature of collective bargaining agreements - - documents for industrial self governance that are necessarily incomplete - - and on the essential role played by the grievance and arbitration process in the ongoing perfection and elaboration of these basic documents. To ensure that the rules developed to refine the parties' relationship remain their own, our national labor policy mandates that only in the most exceptional circumstances should judges rather than the parties themselves or their chosen arbitrator perform this delicate task. *See United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-583 (1960).

To effectuate this goal, the contract exhaustion doctrine has evolved to preclude unnecessary judicial consideration of employee claims arising under collective bargaining agreements. According to this doctrine, an employee may not go directly to court where there is an alleged breach of the collective bargaining agreement. Instead, the employee must first present the grievance to the union, which has broad discretion to determine whether and how, in the best interests of all employees, the claim should be resolved. In the unusual case where the parties themselves cannot resolve the dispute, the union determines whether to take

the grievance to arbitration, and where arbitration does occur, the decision of the arbitrator is ordinarily final. Only if excused from this exhaustion requirement, as by a breach of the union's duty of fair representation, may the employee place the matter before the judiciary instead. *See Hines v. Anchor Motor Freight,* 424 U.S. 554 (1976); *Vaca v. Sipes,* 386 U.S. 171 (1967); *Republic Steel Corp. v. Maddox,* 379 U.S. 650 (1965).

Closely analogous to contract exhaustion is the requirement that union members exhaust their internal union appeals before seeking redress in the courts against their union. Even apart from its relation to contract exhaustion, this doctrine, too, serves important policy goals. By providing unions the opportunity to resolve disputes internally, without judicial interference, it strengthens union democracy and promotes a more stable and responsible bargaining relationship. Congress has recognized the importance of these goals, while at the same time protecting union members from prejudicial delay, by authorizing the judiciary to require union members "to exhaust reasonable hearing procedures" for up to four months "before instituting legal or administrative proceedings. . . ." § 101(a)(4), Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411(a)(4). *See NLRB v. Marine & Shipbuilding Workers,* 391 U.S. 418 (1968).

The contract exhaustion doctrine and the intraunion exhaustion doctrine are ordinarily distinct - the former pertaining to grievances under the bargaining agreement and the latter to internal union affairs. Where, however, the union member complains that the union has wrongfully failed to pursue a grievance, the two doctrines coalesce at each of several levels. First, at the procedural level, the issues to which the doctrines relate become closely interrelated. In order to maintain an action against the employer for breach of the bargaining agreement - - an issue subject

to contract exhaustion - - the employee must first show that the union breached its duty of fair representation - - an issue subject to intraunion exhaustion. Further, where the union maintains that it decided not to pursue the grievance because it lacked merit - - the most typical case - - the contract issues and the intraunion issues become interrelalated on the substantive level as well.

Even more important, though, is the interrelation of the two exhaustion doctrines at the policy level. Just as the contract exhaustion doctrine strengthens the union by providing it broad discretionary control over grievances, so too does intraunion exhaustion promote private resolution of contract disputes. Thus, if the employee must appeal the union's decision not to pursue the grievance before going to court against either the union or the employer, the union will have an opportunity, otherwise lost, first to satisfy the employee that its action was correct, thus averting litigation. Conversely, if the union determines on appeal that it mishandled the grievance, litigation is again likely to be averted, because both the union and the employer will now have added incentive to pursue private resolution: the union because it has determined its prior action to be in error and the employer both to avoid litigation and because the issue is now likely to have larger consequences for the parties' ongoing bargaining relationship. If the union does not reverse itself, or if the employer nonetheless refuses to consider the grievance, the employee of course will then be free to seek redress in the courts. Given a reasonable limitation upon the length of time that intraunion procedures must be pursued, such as the four-month limitation contained in Section 101(a)(4), either resolution of the employee's claim will have come promptly, or the employee will be able to initiate a court action without prejudicial delay.

Requiring the pursuit of intraunion appeals before resorting to the courts thus complements the contract exhaustion doctrine and thereby serves important national policies.

The collective bargaining process is encouraged, union responsibility is promoted, and disputes are privately resolved - both between the member and the union and between the union and the employer. Further, this occurs in a manner that not only avoids unfairly burdening the employee, but indeed increases the likelihood of a fair and prompt resolution of the employee's claim.

By contrast, the rule of the Ninth Circuit disserves each of these goals. That rule would require intraunion exhaustion only in two narrow and infrequent circumstances: where the union appeals procedure can formally reinstate the grievance or where the union appeals procedure can award a court-like remedy. Further, the Ninth Circuit would apply this rule to the employer and the union separately, thus leading to the recognized "anomaly" of the present case where the union is dismissed and the employer is not. *Clayton v. ITT Gilfillan, supra,* 623 F.2d at 566-571.

The Ninth Circuit here errs, first because it fundamentally misconceives the role of intraunion exhaustion. Intraunion procedures are not substitutes for either the courts or the contract grievance procedure, and they should not be required to provide the same kind of relief. Rather, their role in this context is to *facilitate* private resolution, either by the parties themselves or by their chosen arbitrator. So long as an appeal may be taken from the union's decision to drop the grievance, that is sufficient for this role. If such resolution is not forthcoming in a reasonable time (and this is why it need not be guaranteed), then the employee is free to go to the courts, without having suffered prejudicial delay.

Beyond being unnecessary to promote private resolution of disputes, the strictures placed upon intraunion procedures by the Ninth Circuit actually disserve that goal. Very few intraunion procedures would satisfy either of the Ninth

Circuit's criteria to qualify for exhaustion. As a consequence, the potential for private resolution present in those procedures that can address whether the grievance was properly dropped, but can neither award court-like relief nor guarantee reinstatement of the grievance, would be lost. Those cases would go instead to the courts, despite the consensus that judicial intrusion into the bargaining relationship should be the exception and not the rule.

Further, to apply any such criteria so as to dismiss the union but not the employer creates an actual disincentive for private resolution. With the union out of the case, the action against the employer becomes substantially easier to maintain, because on the key and threshold issue of the breach of the duty of fair representation, the union is not required to defend itself. It is the employer that must assume this defense, with neither firsthand access to the evidence nor with incentive for the union to cooperate. As a consequence, the employee stands to gain a decided advantage in court by deliberately not pursuing the intraunion appeal, an outcome clearly counter to the policies supporting both intraunion and contract exhaustion.

For all these reasons, then, the decision of the Ninth Circuit should be rejected. By employing an unduly formalistic approach without proper regard for the overall structure of our national labor policy, it unnecessarily restricts resort to intraunion procedures and does so in a manner that actually disserves that policy. In place of this restrictive rule, *Amicus* respectfully urges the Court to require, as a precondition to suit against either the employer or the union, the reasonable pursuit (for up to four months) of intraunion appeals wherever such procedures have the capacity to address the union's handling of the grievance. Given the effect upon the overall bargaining relationship, the importance of private resolution, the limited burden this rule places upon the employee, and the potential cost

to stable labor relations of the alternative, no less than this should be required before permitting the courts to intervene in the collective bargaining relationship.

Accordingly, *Amicus* respectfully urges the reversal of the Ninth Circuit's decision with regard to the Company. The Union's procedures involved here had the requisite capacity to entertain an appeal from the decision not to pursue the grievance, and Clayton had notice of those procedures. His failure, therefore, even to attempt such private resolution should preclude a lawsuit against either the Union or the Company.

III.

ARGUMENT

A. National Labor Policy Favors Private Resolution of Disputes

At the root of our national labor policy is a decided and strong preference for the private resolution of labor disputes, including those arising under collective bargaining agreements. Congress has made this preference explicit, declaring in Section 203(d) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 173(d), "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. . . ." As the Court recognized in *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566 (1960), "[The congressional] policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play."

This preference derives first from the national labor policy to avoid industrial strife by encouraging collective bargaining. Industrial peace is more likely to be served if the parties themselves work out the terms of their bargaining relationship, than if those terms are dictated from the

outside. Thus, while regulating the process of bargaining, Congress has chosen to leave the outcome primarily to the parties themselves. *See H. K. Porter Co. v. NLRB,* 397 U.S. 99, 102-103, 107-108 (1970).

The policy preference for private resolution also derives from the unique nature of the collective bargaining agreement and the important role that the grievance and arbitration procedure plays in the collective bargaining process. A collective bargaining agreement is not an ordinary contract; it is rather "an effort to erect a system of industrial self-government," *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 580 (1960). *See* Shulman, *Reason, Contract, and Law in Labor Relations,* 68 Harv. L. Rev. 999, 1004-1005 (1955). Necessarily, the written agreement itself, while establishing the basic framework of the parties' relationship, cannot possibly cover the myriad circumstances that arise in the workplace. "There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages." *United Steelworkers v. Warrior & Gulf Navigation Co., supra,* 363 U.S. at 579, *quoting* Cox, *Reflections Upon Labor Arbitration,* 72 Harv. L. Rev. 1482, 1498-99 (1959).

What must supplement the agreement itself is the "common law of the shop," Cox, *supra,* 72 Harv. L. Rev. at 1499, and the preferred means for establishing that common law is by the parties themselves, either informally or through their grievance and arbitration process. As described by Justice Douglas in *United Steelworkers v. Warrior & Gulf Navigation Co., supra,* 363 U.S. at 581:

> [T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means

> of solving the unforeseeable by molding a system of private law for all problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.

Preferably, the parties themselves should be permitted to perform this interstitial role. They are in a unique position to work out, on a case-by-case basis, arrangements that best serve the overall bargaining relationship, as well as the interests of all employees. Through informal negotiations and give and take, most differences do not even reach the formal grievance stage, and of those that do, nearly all are resolved by the parties themselves. Where the parties cannot work out their own differences, both Congress and the courts have declared their strong preference that these disputes go to arbitrators rather than to judges. *See* Section 203(d) of the Labor-Management Relations Act, 29 U.S.C. 173(d); *United Steelworkers v. American Mfg. Co., supra,* 363 U.S. at 567; *United Steelworkers v. Warrior & Gulf Navigation Co., supra,* 363 U.S. at 581-82; *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 596-597 (1960).[3]

Thus, a number of important factors combine to create a strong preference in our national labor policy for the pri-

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3. This preference rests on both expertise and approach. Arbitrators typically are chosen by the parties precisely because of their knowledge of the plant or industry involved and because the parties have confidence that the chosen arbitrator will fill in the gaps of the collective bargaining agreement in an acceptable fashion. Arbitrators, too, can be expected to have greater sensitivity to the consequences of their decisions not only for the ongoing relationship of the parties, but for other employees in the bargaining unit as well. *See United Steelworkers v. American Mfg. Co., supra,* 363 U.S. at 567; *United Steelworkers v. Warrior & Gulf Navigation Co., supra,* 363 U.S. at 580-582.

vate resolution of disputes: The avoidance of industrial strife through encouragement of collective bargaining, the unique nature of collective bargaining agreements, the superior position of the parties to reach settlements that take into account other employees and the parties' overall relationship, and, where the parties cannot resolve the matter, the preference for their chosen arbitrator rather than a court to fill out the collective bargaining agreement. To be sure, the preference for private dispute resolution is not absolute, but it should weigh heavily in the determination of whether and to what extent pursuit of intra-union remedies should be required before resort to the courts. As shown below, to require such pursuit complements the well-established contract exhaustion doctrine, thereby increasing substantially the likelihood of private resolution. Not to do so means that many cases that could have been resolved by the parties themselves, or by their arbitrator, will instead end up in the courts.

B. The Contract Exhaustion Doctrine Promotes Private Resolution of Disputes and Other Important National Labor Policies

To effectuate this preference of our national labor policy for the private resolution of disputes, the courts have developed a contract exhaustion doctrine. *See Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *Vaca v. Sipes*, 386 U.S. 171 (1967); *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). According to this doctrine, an employee may not bring an action in court for breach of the collective bargaining agreement unless he or she has first exhausted the available remedies under the contract grievance procedure, or is excused from doing so. As a result of this doctrine, most grievances are settled by the parties themselves, a small fraction end up in arbitration, and very few end up in the courts. *See Vaca v. Sipes, supra*, 386 U.S. at 192 n.15.

Central to the successful operation of this process are two important factors: that unions be permitted control over access to arbitration and that they be given broad leeway to reach settlement. As this Court observed in *Vaca v. Sipes, supra,* 386 U.S. at 191:

> In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration. Through this settlement process, frivolous grievances are ended prior to the most costly and time consuming step in the grievance procedures. Moreover, both sides are assured that similar complaints will be treated consistently, and major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved.

Accordingly, the exhaustion doctrine generally should be shaped by the importance of promoting responsible union conduct in the handling of contract grievances. To permit the union to be by-passed not only weakens the union, but more significantly weakens and destabilizes the bargaining relationship itself. The preference for private resolution cannot be achieved without responsible union participation in the process.

While the goal of private resolution thus demands responsible union conduct, the contract exhaustion doctrine that serves this goal also promotes important union institutional values in return. "Such activity complements the union's status as exclusive bargaining representatives by permitting it to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance the union's prestige with employees." *Republic Steel Corp. v. Maddox,* 379

U.S. 650, 653 (1965); *accord, Vaca v. Sipes, supra,* 386 U.S. at 191; *see* Cox, *Rights Under A Labor Agreement,* 69 Harv. L. Rev. 601, 625 (1956). Thus, the goal of private dispute resolution and the relationship between the union and its members cannot be regarded separately. They are mutually dependent.[4]

To achieve industrial peace for all employees, the interests of individuals must on occasion be subordinated. Accordingly, the individual employee has no "absolute right to have his grievance taken to arbitration," *Vaca v. Sipes, supra,* 386 U.S. at 191, even though the grievance may have merit. *See Hines v. Anchor Motor Freight, supra,* 424 U.S. at 570-71. This consequence of the contract exhaustion doctrine is thus part of the broader "collective bargaining system as encouraged by Congress," which, as the Court has observed, "of necessity subordinates the interests of [the] individual employee to the collective interests of all employees in [the] bargaining unit." *Vaca v. Sipes, supra,* 386 U.S. at 182.

While the collective interest requires this subordination, it is of course not without limit. To guard against abuse, the Court has placed upon unions a corresponding duty of fair representation. Thus, where the employee "has been prevented from exhausting his contractual remedies by the

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4. The responsible involvement of the union thus promoted by contract exhaustion also ensures that the collective interests of all employees are respected. Rarely does a dispute affect only the grievant. Precedents are set, and promoting the interests of the grievant may come at unreasonable expense to other employees. Through responsible control of the grievance procedure, the union is able to weigh the competing considerations and strike the balance that best serves the interests of all employees. *See Republic Steel Corp. v. Maddox, supra,* 379 U.S. at 656. To permit this screening process to be circumvented has been recognized as posing a serious threat to industrial peace. *See* Cox, *supra,* 69 Harv. L. Rev. 601, 626-27 (1956). *But see* Summers, *Individual Rights in Collective Agreements and Arbitration,* 37 N.Y.U. L. Rev. 362, 392-95 (1962).

union's *wrongful* refusal to process the grievance," the employee "may seek judicial enforcement of his contractual rights. . . ." *Vaca v. Sipes, supra,* 386 U.S. at 185 (emphasis in original). Even so, however, this exception to contract exhaustion has not been broadly construed. As noted above, it is not sufficient to establish such wrongful refusal that the grievance had merit. *See Hines v. Anchor Motor Freight, supra,* 424 U.S. at 570-71. The employee must show that the union's conduct was "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes, supra,* 386 U.S. at 190.

In summary, then, the contract exhaustion doctrine serves a number of important and interrelated values. Foremost, it promotes the private resolution of disputes, and does so in a manner that strengthens the effectiveness of the union. Collective bargaining is thereby encouraged and industrial strife avoided. Yet, while benefiting the union, this mechanism for private dispute resolution also demands that the union function responsibly. The union's relationship with its members and the internal procedures which deal with that relationship, therefore, are not without effect upon the union's bargaining relationship with the employer.

While the Court has recognized an exception to contract exhaustion where the union breaches its duty of fair representation, this exception has not been broadly construed. The necessity of union discretion in the handling of grievances and the importance of private dispute resolution weigh too heavily in the balance. These same principles, and others, dictate a like result in the present case. Here, too, what is at issue is the scope to be given exception to contract exhaustion, and here, too, the exception should be construed narrowly. Otherwise, as shown in what follows, the values which underlie and require contract exhaustion will be seriously undermined.

C. Reasonable Pursuit of Intraunion Appeals Complements Contract Exhaustion and Promotes Other Important National Labor Policies

Closely analogous to contract exhaustion is the requirement that union members exhaust their internal union appeals before seeking redress in the courts against their union. Even apart from its relation to contract exhaustion, this doctrine, too, serves important policy goals. By providing unions the opportunity to resolve disputes internally, without judicial interference, it strengthens union democracy and promotes a more stable and responsible bargaining relationship. As Professor Cox has instructed, "Courts and administrative agencies should not interfere in the internal affairs of labor organizations, if union democracy is our goal, until the organization has had a reasonable opportunity to correct any mistakes of subordinate bodies." Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959,* 58 Mich. L. Rev. 819, 839 (1960). Professor Aaron concurs: "Democratic processes atrophy when they are not exercised; union members will have no interest in improving their organization's internal adjustment procedures if they never are required to use them." Aaron, *The Labor-Management Reporting and Disclosure Act of 1959,* 73 Harv. L. Rev. 851, 869 (1960). *See also* Summers, *The Law of Union Discipline: What the Courts Do In Fact,* 70 Yale L. J. 175, 207 (1960).

Congress has recognized the importance of these values in Section 101(a)(4) of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411(a)(4). While restricting the power of unions to limit the right of members to resort to the courts, Congress has provided that the judiciary, in its discretion, may nonetheless require union members "to exhaust reasonable hearing procedures . . . within [the union], before instituting legal or administra-

tive proceedings. . . ." *Id.*[5] Further, to strike a balance between promoting union responsibility on the one hand, while not unduly burdening the individual employee on the other, Congress has limited this exhaustion requirement to four months. *Id.* As such, this limitation represents Congress' judgment that restraint from resort to the courts for up to four months is a reasonable price for the important values promoted by requiring pursuit of intraunion appeals.[6]

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5. In *NLRB v. Marine & Shipbuilding Workers*, 391 U.S. 418 (1968), the Court recognized that the "exhaustion proviso" of Section 101(a)(4) is a rule of judicial administration and stated that the proviso means that "the public tribunals whose aid is invoked *may in their discretion* stay their hands for four months, while the aggrieved party seeks relief within the union." *Id.* at 426 (emphasis added). *See also Detroy v. American Guild of Variety Artists*, 286 F.2d 75, 78 (2d Cir.), *cert. denied*, 366 U.S. 929 (1961). *See generally* Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, 839 (1960) (intraunion exhaustion is generally a rule of judicial administration).

Although the lower federal courts are divided on the question whether Section 101(a)(4)'s exhaustion proviso is applicable in Section 301 duty of fair representation actions, the majority of cases have applied the statute. *See, e.g., Clayton v. ITT Gilfillan*, 623 F.2d 563, 566 n. 2 (9th Cir. 1980), *Battle v. Clark Equipment Co.*, 579 F.2d 1338 (7th Cir. 1978); *Brady v. Trans World Airlines, Inc.*, 401 F.2d 87 (3rd Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969) (under Railway Labor Act); *but see Chambers v. Local 639, Int'l. Bhd. of Teamsters*, 578 F.2d 375 (D.C. Cir. 1978). Without regard to whether Section 101(a)(4) is *controlling*, however, it would certainly appear to be the appropriate place for the Court to look for guidance in shaping the rules of judicial administration applicable here to intraunion exhaustion, given the similarity between duty of fair representation claims and the rights secured by Title I of the LMRDA, in which the Section 101(a)(4) exhaustion proviso appears. *See.* 29 U.S.C. § 411(a)(1-5).

6. The lower federal courts also have recognized that deferral to intraunion procedures serves important institutional goals of unions and promotes private dispute resolution within the union appeals process, thereby obviating the necessity of judicial action. *See, e.g., Ruzicka v. General Motors Corp.*, 523 F.2d 306, 311 (6th Cir. 1975); *Imel v. Zohn Mfg. Co.*, 481 F.2d 181, 183 (10th Cir. 1973), *cert. denied*, 415 U.S. 915 (1974); *Brady v. Trans-World Airlines*, 401 F.2d 87, 104 (3rd Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969).

Ordinarily, pursuit of such appeals is distinct from the exhaustion of contract remedies. The former pertains to internal union affairs, whereas the latter pertains to grievances under the bargaining agreement. Where, however, the union member complains that the union has wrongfully failed to pursue a grievance, the two doctrines become both interrelated and complementary.

This begins at the procedural level. Where the employee brings suit on the collective bargaining agreement, he or she must first excuse non-exhaustion of contract remedies, and most often this is accomplished by showing a breach of the union's duty of fair representation in the handling of the employee's grievance. *See generally* Clark, *The Duty of Fair Representation: A Theoretical Structure,* 51 Tex. L. Rev. 1119 (1973); Simpson & Berwick, *Exhaustion of Grievance Procedures and The Individual Employee,* 51 Tex. L. Rev. 1179 (1973). As a result of this "intricate relationship between the duty of fair representation and the enforcement of collective bargaining contracts," the complaint against the union becomes a "critical issue" in the action against the employer. *Vaca v. Sipes, supra,* 386 U.S. at 183. Given this intricate relationship between the union issues and the contract issues, there correspondingly results an intricate relationship as well between the exhaustion doctrines applicable to these issues. Neither is without effect upon the other.

Substantively, the interrelationship continues. In what is probably the most frequent case, the union decides not to proceed with a grievance because it appears to lack merit. Where the employee brings suit on this grievance, the union's defense and the employer's defense become substantively interrelated as well. Each asserts in effect that the contract was not breached.

Most important, however, is the interrelationship between contract exhaustion and intraunion exhaustion on the policy level. As noted above, contract exhaustion both promotes and demands responsible union conduct, the primary institutional goal of intraunion exhaustion. Likewise, intraunion exhaustion promotes the goal of contract exhaustion, namely, the private resolution of disputes. Thus, where the employee must appeal a union decision not to pursue the grievance before resorting to court against either the union or the employer, the union has an opportunity, otherwise likely to be lost, first to persuade the employee through fair hearing procedures of the correctness of its action, thus averting litigation. Should the union decide instead that its own action was wrong, private resolution is likely as well, since the employer would be ill-advised not to consider a grievance acknowledged by the union to have been dropped improperly.[7] If the union does not reverse itself, or if the employer nonetheless refuses to settle the grievance or place it back on track in the arbitration procedure, then the employee is free to pursue a judicial remedy. Given a reasonable limitation upon the length of time that intraunion procedures must be pursued, such as the four-month limitation contained in Section 101(a)(4), this opportunity for private resolution will have come at little cost to the employee.[8]

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7. Under such circumstances, an employer is very likely to waive the collective bargaining agreement's time limitations for the processing of grievances and "reinstate" the grievance for resolution under the contract. *See, e.g.*, Barker, *The Employer's Stake in the Union's Duty of Fair Representation: A Form of Liability Without Fault--The Employer's Duty to Police the Handling of Employee Grievances*, in LABOR LAW DEVELOPMENTS 1978, *24th Annual Institute of Southwestern Legal Foundation* 61, 76-77 (1978). The threat of litigation does not provide the only, or even the primary, motive for the employer thus to entertain an untimely grievance. More importantly, the employer must also consider its overall relationship with the union to whom the reconsidered grievance is now likely to have assumed substantial importance.

In summary, where the employee seeks to excuse non-exhaustion of contract remedies on the ground that the union breached its duty of fair representation, there arises an intricate and complementary relationship between contract exhaustion and intraunion exhaustion. Each serves the policy goals of the other; to by-pass either disserves those goals. The two procedures, therefore, should not be viewed in isolation. Instead, limited intraunion exhaustion should be required as a necessary adjunct to contract exhaustion. In particular, where the union decides not to pursue an employee's grievance against the employer, and where the union has an internal procedure for appealing that decision, the employee should not be permitted to go to court against either the union or the employer without first having pursued such an appeal for at least four months.[9] Given the realities of the bargaining place, there is a substantial likelihood that the dispute will be resolved

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8. The adoption of a limited intraunion exhaustion requirement which simply mandates a resort to internal union remedies for a reasonable period (such as four months) prior to the filing of a judicial action would cure a major complaint lodged against the intraunion exhaustion requirement, that the rule sometimes "exhausts" employee-members rather than intraunion remedies. *See, e.g., NLRB v. Marine & Shipbuilding Workers*, 391 U.S. 418, 425 (1968); *Dorn v. Meyers Parking Sys.*, 395 F. Supp. 779, 783 (E.D. Pa. 1975).

Certainly, Petitioner Clayton would not have been disadvantaged by a rule that required his pursuit of an intraunion appeal for at least four months before filing suit. The Union withdrew its request to arbitrate Clayton's grievance on July 11, 1975, and Clayton thereafter did not file his duty of fair representation action until February 5, 1976, six months after the union decision not to press his grievance to arbitration. (A.22-23, Petitioner Clayton's Opening Brief at 4.)

9. Exhaustion should, of course, not be required where it would be futile, but this should require a compelling showing, given the importance of the policies involved and the limited nature of the requirement. *See Fizer v. Safeway Stores, Inc.*, 586 F.2d 182, 183 (10th Cir. 1978) (excuse from intraunion exhaustion requires a "clear and positive showing of futility"); *Cf. Glover v. St. Louis-San Francisco Ry. Co.*, 393 U.S. 324, 330 (1969) (exception to exhaustion requirement exists where "wholly futile"). Where the union refuses or lacks the procedures to consider the appeal, exhaustion should be excused.

privately during this period, or at least placed back on track in the established grievance and arbitration procedure. If this does not occur, the employee will be free to go to court soon enough.[10]

D. The Decision of the Ninth Circuit Disserves Private Resolution and Other Important National Labor Policies

As demonstrated above, to require a limited but reasonable pursuit of intraunion appeals before any judicial action is brought promotes private resolution of disputes and contributes to democratic and responsible union conduct. By contrast, the rule of the Ninth Circuit disserves each of these goals. That rule would require interunion exhaustion only in two narrow and infrequent circumstances: where the union appeals procedure can formally reinstate the grievance[11] or where the union appeals procedure can

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10. Both the courts and legal commentators have recognized that to require utilization of intraunion procedures has important advantages for the judiciary as well. Professor Summers describes these succinctly: "First, union appellate tribunals may take corrective action, thus reducing the burden of the courts. Second, the benefit of the expert judgment of these tribunals might aid courts in making more responsible decisions." Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 Yale L. J. 175, 207 (1960). *Accord* Simpson & Berwick, *Exhaustion of Grievance Procedures and the Industrial Employee*, 51 Tex. L. Rev. 1179, 1217 (1973); *see also Detroy v. American Guild of Variety Artists*, 286 F.2d 75, 79 (2nd Cir.), *cert. denied*, 366 U.S. 929 (1961).

11. In holding that both the employer and the union may properly rely on the exhaustion of internal union remedies' defense in cases where the union appeals process may result in reinstatement of the employee's grivance, the Ninth Circuit expressly recognized that an exhaustion requirement under such circumstances would promote private dispute resolution. *Clayton v. ITT Gilfillan*, 623 F.2d 563, 569 (9th Cir. 1980). Other federal courts have also held that both the union and the employer may exercise an exhaustion defense if the internal union procedures themselves could resolve the grievance, or if resort to the union procedures could get the grievance-arbitration process "back on track." *See, e.g., Varra v. Dillon Companies, Inc*, 615 F.2d 1315, 1317-18 (10th Cir. 1980); *Baldini v. Local 1095, UAW*, 581 F.2d 145, 150 (7th Cir. 1978); *Harrison v. Chrysler Corp.*, 558 F.2d 1273, 1277-79 (7th Cir. 1977); *Orphan v. Furnco Constr. Corp.*, 466 F.2d 795, 800-01 (7th Cir. 1972).

award a court-like remedy. *Clayton v. ITT Gilfillan, supra,* 623 F.2d at 566-69. Further, the Ninth Circuit would apply this rule to the employer and union separately, thus leading to the recognized "anomaly" of the present case where the union is dismissed but the employer is not.[12] *Id.* at 570.

The Ninth Circuit here errs, because it fundamentally misconceives the relationship between intraunion appeals and the contract grievance procedure. Intraunion procedures are not substitutes for either the courts or the contract grievance procedure, and they should not be required

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12. Several other courts also have denied the intraunion exhaustion defense to employers in cases where the defense has been granted to the union. Almost all of these courts have used a "contract analysis" to reach this result, reasoning that the requirement of intraunion exhaustion stems from the union constitution — a "contract" between the union and its members — and that the employer has no "contractual standing" to rely on the exhaustion provisions contained in the union constitution. *See, e.g., Geddes v. Chrysler Corp.,* 608 F.2d 261, 264 (6th Cir. 1979); *Fizer v. Safeway Stores Inc.,* 586 F.2d 182, 184 (10th cir 1978); *Winter v. Local 639, Int'l. Bhd. of Teamsters,* 569 F.2d 146, 150 (D.C. Cir. 1978); *Harrison v. Chrysler Corp.,* 558 F.2d 1273, 1278 (7th Cir. 1977); *Orphan v. Furnco Constr. Corp.,* 466 F.2d 795, 801 (7th Cir. 1972); and *Peterson v. Rath Packing Co.,* 461 F.2d 312, 315 (8th Cir. 1972). This legalistic approach both ignores the effect of such a rule on our national labor policy and fails to account for the fact that exhaustion requirements are in reality rules of judicial administration, available to the courts in their discretion without regard to what the "contract" states. Cox, *supra,* 58 Mich. L. Rev. at 839. Thus, exhaustion of collective bargaining contract remedies is required without regard to whether the agreement so mandates, because the requirement derives not from the "contract" itself but from our national labor policy. The same should hold true of intraunion exhaustion. Further, recognizing the proper basis for intraunion exhaustion would cure a principal objection that many commentators have cited to the contract theory: the disparate impact on union members and non-members. *See, e.g.,* Fox & Sonenthal, *Section 301 and the Exhaustion of Intraunion Appeals: A Misbegotten Marriage,* 128 U. Pa. L. Rev. 989, 1015 (1980); Simpson & Berwick, *supra,* 51 Tex. L. Rev. at 1221. If exhaustion is instead viewed as a rule of judicial administration, no such unfairness results.

to provide the same kind of relief.[13] Rather, their role in this context should be to *facilitate* private resolution, either by the parties themselves or by their chosen arbitrator. As shown above, union appeals can fulfill this facilitator role so long as they have the capacity to address whether the union wrongfully handled the grievance.[14] They do not need to provide relief themselves, nor do they require a formal linkage to the contract grievance procedure, so that a reversal by the union automatically reinstates the grievance. That an appeal may be taken from the union's decision not to pursue the grievance is sufficient to promote the desired goal of private resolution through the other established procedures. If such resolution is not forthcoming in a reasonable time (and this is why it need not be guaranteed),

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13. The decision of this Court in *NLRB v. Marine & Shipbuilding Workers*, 391 U.S. 418 (1968) is not to the contrary. There the Court held that a union may not discipline a member for filing an unfair labor practice charge with the NLRB prior to exhausting internal union remedies, because, among other reasons, such internal union procedures were "plainly inadequate" for dealing with the public-policy matters involved there, which went "beyond the internal affairs of the union." *Id.*, at 425, 426 n. 8. While breach-of-contract/unfair-representation cases likewise raise issues that go beyond the internal affairs of the union, they do so in a manner that argues in favor of exhaustion not against, since the purpose of exhaustion here is not to provide relief in lieu of that from other forums, but rather to channel the disputes to the forum in which they ought to be decided. Thus, in consideration of the relevant policy goals, the "adequacy" of the intraunion procedures in the present context should be measured according to their capacity to promote private resolution by the parties or their arbitrator, and not according to whether they can provide the desired relief directly. By this measure, as shown above, an intraunion procedure with the capacity to entertain an appeal from the decision not to pursue the grievance is "adequate".

14. Conversely, where the union appeals procedure cannot address whether the grievance was properly handled, the limited exhaustion requirement suggested herein should not apply. For example, the requirement should not apply "in situations where the intraunion remedies provide for discipline but not for vindication and reversal of the allegedly improper decision." *Neipert v. Arthur G. McKee & Co.*, 448 F. Supp. 206, 210 (E.D. Pa. 1978). *See also Orphan v. Furnco Constr. Corp.*, 466 F.2d 795, 801-02 (7th Cir. 1972).

then the employee is free to go to the courts, without having suffered prejudicial delay.[15]

Beyond being unnecessary to promote private resolution of disputes, the strictures placed upon intraunion procedures by the Ninth Circuit actually disserve that goal. Very few intraunion procedures would satisfy either of the Ninth Circuit's criteria to qualify for exhaustion.[16] As a consequence, the potential for private resolution present in those procedures that can address whether the grievance wrongfully was dropped, but can neither award court-like relief nor guarantee reinstatement of the grievance, would be lost. Those cases would go instead to the courts, despite the consensus that judicial construction of bargaining agreements should be the exception and not the rule. Similarly, the potential for promoting union responsibility present in this larger class of intraunion procedures would also be lost. As a result, not only would union members lose the potential for more democratic procedures, but the bargaining relationship itself, importantly dependent upon responsible union conduct, would suffer as well.

Further, to permit any such criteria to apply to the union or employer independently of the other creates an actual disincentive for private resolution. Thus, as in the present case, where independent application of the criteria results in dismissal of the union but not the employer, the employee

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15. Just as the relief available from the intraunion procedure need not be court-like in order to promote private resolution, so too there is no need that the entire procedure be completed within the four-month period. That even the first step of the appeal can be taken during this period should be sufficient. Further, where the intraunion procedure *can* lead itself to complete relief, a court in its exercise of discretion might reasonably require that the procedures be pursued to completion rather than just for four months.

16. A review of the relevant case law has failed to disclose that any union appeals process other than that of the UAW provides for the award of money damages to compensate a member for the union's breach of the duty of fair representation.

may be well advised not to pursue intraunion appeals at all. If the employee does not, the union will be relieved of liability and out of the case. The action against the employer then becomes substantially easier to maintain, because on the key and threshold issue of the breach of the duty of fai representation, the union is not required to defend itself. Instead, it is the employer that must defend what the union has done, with neither firsthand access to the evidence nor incentive for the union to cooperate. As a consequence, the employee stands to gain a decided advantage in court by deliberately not pursuing the intraunion appeal, an outcome clearly counter to the policies supporting both intraunion and contract exhaustion.[17]

For all these reasons, then, the decision of the Ninth Circuit should be rejected. In shaping its exhaustion rule, the Ninth Circuit has failed to take properly into account the structure of our national labor policy, just as it has failed to appreciate the contribution that intraunion exhaustion can make to the important goal of private resolution of disputes. As a consequence, it unnecessarily restricts resort to intraunion procedures and does so in a manner that actually disserves these goals of our national policy. In place of this restrictive rule, *Amicus* respectfully urges the Court to require, as a precondition to suit against either the employer or the union, the reasonable pursuit (for up to four months) of intraunion appeals wherever such procedures have the capacity to address the union's handling of

17. Moreover, allowing the union, but not the employer, the ability to claim an exhaustion defense raises a disturbing potential for collusion between the member-employee and the union. The member will be encouraged to sue only the employer and to forego filing an intraunion appeal in return for the union's assistance (or lack of opposition) in regard to establishing a breach of the union's duty of fair representation. Such arrangements appear entirely plausible because the union would not face any potential liability, even if named as a defendant, due to its exhaustion defense.

the grievance.[18] Given the effect upon the overall bargaining relationship, the importance of private resolution, the limited burden this rule places upon the employee, and the potential cost to stable labor relations of the alternative, no less than this should be required before permitting the courts to intervene in the collective bargaining relationship.

Application of the suggested rule to the facts of this case should result in the dismissal of *both* of Clayton's actions — that against the Union *and* that against the Company. The UAW procedure clearly had the capacity to address whether the grievance was wrongfully dropped. Clayton was not only familiar with this procedure generally but was notified of it specifically at the time the Union decided not to pursue his grievance. There is no showing that pursuit of the appeal would have been futile. Accordingly, having failed even to attempt the use of procedures that could have led to the resolution of his claim privately, he should not now be permitted to pursue his claim in court.

E. Failure to Pursue Intraunion Remedies Should Be a Defense for Both the Union and the Employer or For Neither

As demonstrated above, reasonable pursuit of intraunion appeals should be a prerequisite to suit against either the employer or the union. If, however, the Court should conclude that failure to pursue such appeals is not a defense available to the employer, then *Amicus* respectfully urges that the defense should not be available at all.

As the Court observed in *Vaca v. Sipes, supra,* 386 U.S. at 197, employers and unions "probably should" both be joined as defendants in fair representation/Section 301 actions. The issues as to the union and the employer are

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18. Where the employer and the union have agreed that a reversal by the union on appeal automatically reinstates the grievance, the four-month limitation would not apply, because in that case the intraunion procedures are in actuality part of the contract grievance-arbitration procedure itself, which of course is not subject to the four-month limitation. Similiarly, even in the absence of a formal mechanism allowing reinstatement of the grievance, if the union and the employer agree in a particular case to reinstate the grievance

intricately related (breach of the union's duty of fair representation being an essential element in the breach of contract action against the employer), *Id.*, at 183, and damages are to be apportioned according to "the fault of each," *Id.*, at 197. While *Amicus* takes no position as to whether this interrelation of issues and damages makes either party indispensible to an action against the other,[19] at a minimum it should be taken into account in determining the scope to be given the intraunion exhaustion requirement, which, as noted above, is at base a rule of judicial administration.

Included in this determination as well should of course be the effect of the rule upon the private resolution of disputes. As pointed out above, where the union may rely on the defense of failure to exhaust but the employer may not, there arises an incentive to by-pass both the intraunion *and*

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within four months of the initiation of the member's intraunion appeal, that, too, should preclude resort to the courts.

19. Several federal courts have held that a union is an "indispensable party" under Fed. R. Civ. P. 19 in a duty of fair representation action under Section 301. *Bradley v. Ford Motor Co.*, 417 F. Supp. 23 (N.D. Ill. 1975); *Kinnunnen v. American Motors Corp.*, 56 F.R.D. 102 (E.D. Wis. 1972); *but see Kaiser v. Local 83, Int'l Bhd. of Teamsters*, 577 F.2d 642 (9th Cir. 1978) (*per curiam*); *Serra v. Pepsi-Cola General Bottlers, Inc.*, 248 F. Supp. 684 (N.D. Ill. 1965). *See also* Fox & Sonenthal, *supra*, 128 U. Pa. L. Rev. at 1013, n.85.

Three important rationales support a conclusion that unions are indispensable parties in duty of fair representation cases. First, a duty of fair representation judgment frequently has an impact upon non-party union members and the union's presence in such cases as a party defendant is necessary to safeguard the interests of non-party members. For example, reinstatement of a plaintiff in a wrongful discharge action would affect the seniority status of non-party employees. *See, e.g., Bradley v. Ford Motor Co., supra*, 417 F. Supp. at 25. Second, if the union is a party to the suit, the union can aid the court in the interpretation of the collective bargaining agreement. *Kinnunnen v. American Motors Corp., supra*, 56 F.R.D. at 104; *Johnson v. Colts, Inc.*, 306 F. Supp. 1076 (D. Conn. 1969). Third, courts have recognized that requiring the employer to litigate a duty of fair representation action without the union as a co-defendant is unduly prejudicial and unfair to the employer. *See, e.g., Atwood v. Pacific Maritime Ass'n.*, 432 F. Supp. 491, 493 (D. Ore. 1977).

the contract grievance procedures, resulting in more cases going to the courts rather than being resolved by the parties or their arbitrator as they should be. Further, there also results from dismissal of unions but not employers manifest unfairness. The employer in such a situation is required to defend the *union's* conduct, yet the employer has neither first-hand access to the evidence nor is there any incentive for the union to cooperate.

For all these reasons then -- the interrelation of the issues, the apportionment of damages, the effect on private resolution, and the resulting unfairness to employers, the Court should reject as a matter of sound judicial administration any exhaustion rule which results in dismissing one party but not the other from this kind of action. Accordingly, if the failure to pursue intraunion remedies is not to be an available defense to *both* unions and employers, as *Amicus* submits it should, then it should be available to neither.

IV.
CONCLUSION

For the reasons set forth above, *Amicus* respectfully submits that the judgment of the court of appeals with regard to ITT be reversed and with regard to the UAW be affirmed.

Respectfully submitted,

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January 16, 1981

Nos. 80-54 and 80-5049

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

ITT GILFILLAN, A Division of International Telephone and Telegraph Corporation, a corporation,
Petitioner,

vs.

CLIFFORD E. CLAYTON.
Respondent.

CLIFFORD E. CLAYTON,
Petitioner,

vs.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, and UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL WORKERS OF AMERICA, LOCAL NO. 509,
Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF ON BEHALF OF SAFEWAY STORES, INCORPORATED AND DELTA LINES, INC.

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QUESTIONS PRESENTED

Case No. 80-5049.

1) Does a discharged employee's failure to exhaust his internal union remedies, found at trial to be full, fair and adequate, bar his fair representation action against the UAW?

Case No. 80-54.

1) Does employee's failure to exhaust internal union remedies, which were found to be adequate by district court, bar his action against company as well as union?

2) Does the fact that internal union remedies only provide monetary damages and do not provide for reinstatement make those remedies "inadequate" as defense for company?

3) May internal union remedies be deemed adequate to bar action against union because of employee's failure to exhaust those remedies, but be deemed inadequate to bar action against company because they cannot provide reinstatement of grievance?

4) Is union necessary and indispensable party for employee to prove that union breached its duty of fair representation?

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On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF ON BEHALF OF SAFEWAY STORES, INCORPORATED AND DELTA LINES, INC.

IDENTIFICATION OF PARTIES SUPPORTED

The instant amicus curiae brief is filed in partial support of the positions asserted by International Union, United Automobile, Aerospace and Agricultural Implement Work-

ers of America and United Automobile, Aerospace and Agricultural Implement Workers of America, Local No. 509, Respondents in Case No. 80-5049 (hereinafter referred to as the "Union" or the "UAW") and in full support of the positions asserted by ITT Gilfillan, A Division of International Telephone and Telegraph Corporation, Petitioner in Case No. 80-54 (hereinafter referred to as "ITT").[1]

INTEREST OF AMICUS CURIAE

Safeway Stores, Incorporated is currently party to more than 100 collective bargaining agreements containing grievance and arbitration procedures as the exclusive means for resolving grievances thereunder. Delta Lines, Inc. is also party to numerous collective bargaining agreements containing such exclusive grievance and arbitration procedures. As a party to these numerous agreements, each amicus curiae has a strong interest in assuring that the rules of law applicable to suits brought under Section 301 of the Labor-Management Relations Act, as amended (29 U.S.C. § 185) enhance the ability of such grievance and arbitration procedures to fully and finally resolve contractual disputes.

SUMMARY OF ARGUMENT

The action giving rise to this proceeding is a suit by Clifford E. Clayton (hereinafter referred to as "Clayton"), a former employee of ITT, alleging that his union breached its duty to afford him fair representation by failing to pursue a grievance against his termination and further alleging that ITT breached the governing collective bargaining agreement by effectuating that termination. Clay-

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[1]The Jurisdictional Statement, list of Statutory Provisions Involved and Statement of the Case contained within the brief submitted this date by ITT are adopted in their entirety in support of the positions asserted herein.

ton admittedly failed to exhaust available intra-union avenues of redress. The district court dismissed both causes of action when Clayton's failure to exhaust such remedies was asserted as a defense. The Court of Appeals for the Ninth Circuit affirmed the lower court's decision as to dismissal of the union but reversed as to dismissal of ITT. *Clayton v. ITT Gilfillan*, 623 F.2d 563 (9th Cir. 1980). In Case No. 80-5049, Clayton claims that dismissal of the union was improper. In Case No. 80-54, ITT claims, principally, that Clayton's failure to exhaust available intra-union remedies requires dismissal of both defendants.

The following argument urges that the exhaustion defense[2] is a sound defense consistent with the statutory interests which originally caused judicial recognition of a duty on the part of unions to fairly represent bargaining unit members. Four rationales are discussed in support of this argument. Each of these rationales is examined to determine whether it suggests that employers, as well as unions, may assert the defense. In each case, it is found appropriate to extend the benefits of the exhaustion defense to employers as well as unions. Upon completion of this analysis, three deleterious effects which would ensue from a contrary result are examined in detail.

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[2]Two types of exhaustion defenses may potentially be raised in litigation of this type. In some cases, it may be alleged that the plaintiff has failed to exhaust contractual remedies contained within the governing collective bargaining agreement by, for example, failing to file or pursue a grievance under an agreement recognizing the ability of employees to take these actions. Secondly, it may be alleged that the plaintiff has failed to exhaust available intra-union avenues of redress, as was alleged in the present proceedings. The term "exhaustion defense" will be used to refer to the second type of exhaustion defense hereinafter unless expressly clarified to the contrary.

ARGUMENT

A. The Exhaustion Defense Is Consistent With The Statutory Interests Served By Recognition Of A Duty To Fairly Represent Employees And Should Be Available To Both Unions and Employers.

Federal courts in nearly all circuits have long recognized that exhaustion of adequate intra-union remedies is a prerequisite for any suit alleging that an employee's union has breached its duty of fair representation. See, e.g., *Brady v. Trans World Airlines, Inc.*, 401 F.2d 87 (3d Cir. 1968). The courts which have been called upon to discuss this prerequisite, however, have offered several competing rationales for its existence. Most such rationales have received criticism, to some degree, from commentators. This brief will establish the viability of four alternative rationales which have been offered to support the exhaustion defense and will state the reasons why each such rationale compels that defendant employers, as well as defendant unions, be permitted to claim the benefit of that defense. Before the appropriateness of these four rationales may be discussed cogently, however, it is necessary to clarify the nature of the now well-established cause of action for breach of a union's duty of fair representation. That cause of action has been variously characterized by federal courts and the propriety of the exhaustion defense cannot be tested without a clear understanding of the cause of action to which it responds.

The need to characterize an employee's cause of action for breach of a union's duty to provide fair representation has generally arisen when courts have been called upon to decide which statute of limitations is applicable to such actions. In this context, the First and Fifth Circuits have characterized the action as one in tort. *Sanderson v. Ford Motor Co.*, 483 F.2d 102, 114 (5th Cir. 1973); *De Arroyo v. Sindicato de Trabajadores Packing House,*

AFL-CIO, 425 F.2d 281, 286 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970). In the same context, the Second and Eighth Circuits have characterized the action as one on a written contract. *Butler v. Local 823, Int'l Brotherhood of Teamsters*, 514 F.2d 442, 446 (8th Cir.), *cert. denied*, 423 U.S. 924 (1975); *Abrams v. Carrier Corp.*, 434 F.2d 1234 (2d Cir. 1979), *cert. denied*, 401 U.S. 1009 (1971).

Characterization of the action as one in tort or contract, however, does not accurately explain the source of a union's duty to provide fair representation. That source is, inescabably, ". . . a federal obligation which has been judicially fashioned from national labor statutes." *Abrams v. Carrier Corp.*, 434 F.2d 1234, 1251 (2d Cir. 1970).

A duty on the part of unions to provide fair representation was first recognized by the United States Supreme Court in *Steele v. Louisville and Nashville Railroad Co.*, 323 U.S. 192 (1944). That case dealt with the Railway Labor Act (45 U.S.C. § 151 *et seq.*) which provides for certification of labor organizations as exclusive collective bargaining representatives when designated by a majority of the members in a craft or class. The Court observed that such certification provisions conferred special rights on labor organizations which were accompanied by specific responsibilities and held as follows:

> "We hold that the language of the Act to which we have referred, read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them." 323 U.S. at 202.

The Court later held that a similar *statutory* obligation to provide fair representation arises from those portions

of the National Labor Relations Act (29 U.S.C. § 151 *et seq.*) (hereinafter referred to as the "Act" or the "NLRA") which provide for exclusive recognition of labor organizations by covered employers. As stated by the Court of Appeals for the Ninth Circuit in *Kaiser v. Local No. 83*, 577 F.2d 642, 645 (9th Cir. 1978):

> "In *Vaca* [*Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967)] and *Czosek v. O'Mara*, 397 U.S. 25, 90 S.Ct. 770, 25 L.Ed.2d 21 (1970) the Supreme Court has made clear that an employee's action against his union for violation of the *statutory duty of fair representation* is separate and distinct from the contractual duty of an employer both as to the origin of the liability and the amount of damages." (italics added).

The foregoing makes clear that the responsibility of unions to provide fair representation is an obligation arising from those federal statutes which permit, and many times require, exclusive recognition of labor organizations. This fact is of some moment because it clarifies two facts critical to proper assessment of any defense offered to an action alleging breach of the duty to afford fair representation. First, it is clear that the duty has been judicially created; it has not been created by contracting parties or other private actions. This fact suggests that judicial discretion may be applied in assessing defenses asserted in actions alleging breach of duty. Secondly, it is clear that the duty has been judicially created *in order to serve statutory interests.* Those statutory interests, as defined in *Vaca v. Sipes, supra,* must, therefore, determine the desirability of the exhaustion defense, when made available to either unions or employers.

Those federal courts which have recognized the exhaustion defense to date have supported it through reference

to one or more of four rationales. It has been most prevalent to support the defense as a contract right upon which a defendant union may insist. Union constitutions affording intra-union avenues of redress have been found to constitute binding contracts between labor organizations and their members. The second rationale most frequently relied upon by federal courts suggests that the defense is a worthy means of conserving judicial resources. Courts relying upon this rationale suggest that demanding exhaustion of intra-union remedies may preclude the need for plaintiffs to pursue meritorious cases by conferring the relief which they seek and may sharpen the facts in other cases so as to permit easier judicial resolution. A third rationale for the exhaustion defense has been frequently noted by federal courts in connection with the desirability of protecting judicial resources. Courts have reasoned that interference with internal union affairs should be avoided whenever possible and that the exhaustion defense is an appropriate means of affording labor organizations a first opportunity to ameliorate internal conflict.

A fourth rationale has been relied upon to support the exhaustion defense which is of particular note. Several courts have found that available intra-union remedies are an integral part of the entire collective bargaining process and that a cause of action for breach of the union's duty to provide fair representation cannot be found to have arisen *unless* the union has been provided with an opportunity to display its good or bad faith through this process. In essence, courts relying upon this rationale have found that exhaustion of intra-union remedies is an *essential element* of any cause of action for breach of the union's duty to provide fair representation.

When each of the four rationales summarized above are tested against the statutory interests recognized in *Vaca v. Sipes, supra*, it becomes apparent that the exhaustion

defense, and its availability to employers as well as unions, are critical to interests sought to be served by federal labor policy. The following discussion establishes the bases for so concluding. For ease of reference, the four rationales discussed above will be referred to hereinafter, respectively, as: 1) the contract theory, 2) the judicial economy theory, 3) the nonintervention theory, and 4) the essential element theory.

1. The Contract Theory.

As noted above, most federal courts recognizing the exhaustion defense have found it compelled as a matter of contract between the defendant union and any plaintiff member. See, e.g., *Geddes v. Chrysler Corp.*, 608 F.2d 261 (6th Cir. 1979); *Harrison v. Chrysler Corp.*, 558 F.2d 1273 (7th Cir. 1977); *Anderson v. Grocer's Supply Co., Inc.*, 483 F.Supp. 73 (S.D. Tex. 1979). As stated in *Harrison v. Chrysler Corp., supra,*

> "The exhaustion requirement is based primarily on a contractual obligation to exhaust internal union remedies, assumed by the member upon joining the union and embodied in the union's constitution and regulations." 558 F.2d at 1277.

This rationale for the exhaustion defense has been criticized by commentators on two grounds.[3] First, commentators have urged that the inability of individual union members to control the terms contained within their union constitution militates against finding members contractually bound to follow its procedures. In essence, such constitutions have been characterized as contracts of adhesion.

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[3]See, e.g., *Fox & Sonenthal, Section 301 and Exhaustion of Intra-Union Appeals; A Misbegotten Marriage,* 128 U. Penn. L. Rev. 989 (1980).

Secondly, commentators have urged that premising the exhaustion defense on this ground unfairly produces conflicting results when similar suits are brought by a union member within the bargaining unit and a nonunion member within the bargaining unit. Although intra-union remedies may be available to the latter employee under the applicable constitution, that individual will have no contractual obligation to pursue those remedies.

Interestingly enough, the two bases upon which this rationale has been criticized tend to defeat each other. The very fact that employees in a bargaining unit may choose to become or not become full-fledged members of the union obligated to represent them (*NLRB v. Hershey Foods Corp.*, 513 F.2d 1083 (9th Cir. 1975)), establishes that union constitutions are not contracts of adhesion. There is, therefore, no basis for declining to enforce constitutional provisions requiring exhaustion of intra-union remedies prior to suit. In fact, as noted by the court below in this matter, Congress expressly recognized the enforceability of such provisions in 29 U.S.C. Section 411(a)(4). 623 F.2d at 566, fn. 2.

Courts relying upon this rationale for the exhaustion defense have generally found it to militate against allowing a defendant employer to claim the benefit of the defense. The reasoning of the Court of Appeals for the Sixth Circuit in *Geddes v. Chrysler Corp., supra,* is typical:

> "The intra-union remedies, on the other hand, are part of a separate membership agreement between the union and the members; the employer has no interest in the agreement and has no right to rely on its provisions in seeking dismissal of a claim against the employer." 608 F.2d at 264.

See also, *Anderson v. Grocer's Supply Co., Inc.*, 483 F.Supp. 73, 76 (S.D. Tex. 1979).

The better view, however, recognizes that in most instances the employer has a contractual interest which is integrated with the defendant union's interests in securing enforcement of its constitution. Nearly all collective bargaining agreements contain a provision granting the contracting union recognition as the exclusive collective bargaining representative of covered employees. The collective bargaining agreement governing in the present case is no exception (A 29). Such a provision requires the contracting employer to bargain exclusively with the recognized union for the term of the contract and also requires the contracting union to serve as the exclusive representative of bargaining unit employees for that same term. Typically, this recognition clause tracks closely the terms of 29 U.S.C. Section 159, that portion of the NLRA which the Supreme Court found to impose a duty to provide fair representation in *Vaca v. Sipes, supra.*

If the NLRA's provisions for exclusive recognition impose a duty to fairly represent employees, as found in *Vaca v. Sipes, supra,* then contractual effectuation of those provisions through use of identical terms conferring exclusive recognition *must* give rise to a *contractual* obligation on the part of the union to afford fair representation. In a typical recognition clause, such as the one contained within the collective bargaining agreement governing in this case, the union has contractually bound itself to exclusively (and by implication *fairly*) represent all members of the bargaining unit. The right to insist upon compliance with this commitment is exceedingly important to all contracting employers; unless this contractual benefit is received, no grievance and arbitration procedure may be relied upon as a successful means for fully and finally resolving disputes and preventing labor unrest.

Since an employer such as ITT has a contractual right to demand that a union to which it has extended exclusive

recognition *fairly* represent bargaining unit employees, the employer becomes, in essence, a third party beneficiary to any separate contracts into which the union enters for the purpose of assuring that employees are afforded fair representation. In other words, an employer such as ITT should be regarded as a third party beneficiary of the UAW's constitutional provisions seeking to assure that any unfair or arbitrary representation will be promptly corrected. ITT, as well as the union, should be entitled to insist upon the exhaustion of constitutional provisions designed to remedy unfair representation because it has a contractual right to demand such fair representation. Any other analysis renders a union commitment to serve as exclusive representative hollow and improperly deprives the employer of its right to see grievances fairly, fully and finally resolved through the exclusive grievance and arbitration procedure contained in any agreement.

At least one federal court has recognized the compelling nature of the foregoing analysis when employer contract rights are analyzed as part of the integrated collective bargaining process. The Court of Appeals for the Seventh Circuit stated as follows in *Harrison v. Chrysler Corp., supra:*

> "The question presented is whether the employee owes an obligation to the employer to exhaust available methods of reviving a stalled grievance procedure before abandoning that procedure and resorting to the courts for relief. *We believe such an obligation is implied under a collective bargaining agreement which, like the one in this case, reposes in the union exclusive authority to represent the employee in contractual claims against the employer and which provides grievance machinery as the exclusive method of resolving those claims.*" 558 F.2d at 1278.

Quite clearly, full effectuation of *all* parties' contractual rights requires that the exhaustion defense be made available to employers as well as unions. This conclusion is compelled when the statutory origins of the duty to fairly represent employees are logically applied to the recognition provisions typical of all collective bargaining agreements.[4]

2. The Judicial Economy Theory.

As noted above, numerous federal courts have recognized the exhaustion defense as a legitimate tool for the preservation of judicial resources. The increasing burden upon federal courts is now, unfortunately, notorious. Quite obviously any policy which relieves a portion of that burden without sacrificing the judicious resolution of any dispute should be pursued vigorously. To the extent that judicial resources can be conserved through recognition of the exhaustion defense, therefore, it should be fully honored whether asserted by a defendant union or a defendant employer.

Several courts which have recognized the conservation of judicial resources as a valid basis for recognizing the exhaustion defense have fallen short of dismissing *all* cases in which a plaintiff such as Clayton has failed to exhaust available intra-union remedies. Several such courts have ruled that judicial economy warrants dismissal of a breach of fair duty suit on the grounds that the plain-

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[4]Although the reasoning of the Court of Appeals for the Seventh Circuit leads to this conclusion, that Court of Appeals has declined to permit use of the exhaustion defense by employers *unless* available intra-union channels of redress have the ability to award the plaintiff the exact same relief sought in federal court. Limitation of the exhaustion defense to such situations is the product of fallacies best explained in connection with the second rationale discussed herein, namely, the judicial economy theory.

tiff has failed to exhaust intra-union remedies *only* if available intra-union tribunals have the express authority to confer all remedies sought by the plaintiff in federal court. Such courts have declined to dismiss breach of contract claims seeking reinstatement on the grounds that intra-union tribunals may not compel reinstatement by a former employer. See, e.g., *Baldini v. Local Union No. 1095, UAW,* 581 F.2d 145, 150 (7th Cir. 1978). Upon careful examination, however, it must be concluded that interests of judicial economy compel recognition of the exhaustion defense in *all* circumstances, not merely those where the intra-union tribunal involved directly possesses the authority to confer all relief sought in federal court.

This conclusion is compelled for two reasons. First, it must be remembered that all breach of fair duty/breach of contract actions brought in federal court are *not* meritorious. While empirical data is not available as to the percentage of such suits which eventually prove meritorious, it may safely be assumed that many, if not most, are nonmeritorious. Extra judicial means which assist in identifying and quickly resolving those disputes which are *nonmeritorious* are just as important to the preservation of judicial resources as are extra judicial means which assist in the identification and prompt resolution of meritorious disputes. Almost every federal court to have commented on the exhaustion defense has acknowledged that requiring breach of fair duty plaintiffs to exhaust their intra-union remedies invariably serves to expose valuable evidence directly bearing upon critical issues such as the good or bad faith of involved union representatives, the extent of their investigative and representative efforts and other factual questions which could be made the subject of prolonged discovery and litigation in federal court. See, e.g., *Neipert v. Arthur G. McKee & Company,* 448 F.Supp. 206

(E.D. Pa. 1978). The ability of intra-union remedies to provide such information was expressly acknowledged by the Court of Appeals when it rendered its decision in the present matter:

> "The UAW's liability (if any) for breach of its duty of fair representation would depend on the reasons for the union's withdrawal of the arbitration request. There is little in the record to indicate why the local official changed his mind and withdrew the arbitration request. *But the missing motive is precisely the sort of information that an appellate body within the union would have elicited, compelling a record that would greatly assist the court now.*" 623 F.2d at 566.

Such information is of immense value to a federal court hearing a breach of fair duty/breach of contract action even *if* intra-union avenues of redress are not so broad as to preclude all need for litigation. The value of intra-union remedies as a method for shortening litigation must not be ignored on the sole grounds that a particular intra-union tribunal does not possess the authority to preclude all need for further pursuit of a meritorious claim. The very fact that intra-union remedies may assist the court in promptly identifying meritorious and nonmeritorious claims is of sufficient benefit to warrant recognizing the exhaustion defense on the grounds of judicial economy.

There is a further reason that interests of judicial economy compel recognition of the exhaustion defense in *all* breach of fair duty/breach of contract cases. When such a suit is brought, the defendant union and defendant employer are generally party to an ongoing collective bargaining relationship effecting the terms and conditions of employment for numerous individuals and requiring constant discussion of disputes. *If* a meritorious claim asserting that the union has breached its duty of fair representa-

tion is *promptly* brought to the attention of officials through intra-union appeals, the union is generally in an excellent position to secure a voluntary resolution of the dispute with the employer's cooperation. Most employers are now quite knowledgeable of their potential liability in direct suits asserting breach of contract under the standards set forth in *Vaca v. Sipes, supra.* If union officials gain knowledge of a meritorious claim *promptly* and bring this claim to the employer's attention, voluntary resolution is likely *even in situations where the express terms of the governing contract appear to preclude further grievance processing.* In situations where the potential co-defendants must deal with each other on a day-to-day basis and several disputes of varying importance are typically outstanding at all times, it is generally possible for a union to secure such voluntary resolution *in cases which warrant it* by making a comparable concession to the employer in another area of dispute where the facts suggest that concession is appropriate. In short, in the ongoing give and take of an established collective bargaining relationship voluntary resolution of a claim shown to be quite meritorious is *likely even* where further pursuit of a grievance appears precluded by the governing collective bargaining agreement.

At least one court of appeals has urged that such reasoning should not prevail. In *Harrison v. Chrysler Corp.*, 558 F.2d 1273 (7th Cir. 1977), the Court of Appeals for the Seventh Circuit stated, "There is no basis for assuming that Chrysler willingly would have exposed itself to the very liability that it resists in this action." 558 F.2d 1273. This analysis ignores certain critical facts all too well known to frequent litigants in this area. By the time determinative facts are crystallized through federal discovery procedures, potential damages are generally far greater, and settlement demands higher than they would have been in the early stages of an intra-union appeal. Settlement loses its attractiveness once prolonged litiga-

tion has occurred because its costs no longer compare so favorably to the costs of litigation. In short, settlement of meritorious claims, thereby preserving judicial resources is *most* likely to occur if *prompt* resort to intra-union remedies is consistently compelled by federal courts in this area. Such a policy is clearly consistent with the statutory interests recognized by the Supreme Court in *Vaca v. Sipes, supra.* In that decision, the Court stressed the importance of the settlement process in effectuating federal labor policy and assuring resolution of labor disputes likely to be both prompt and judicious (386 U.S. at 191). In short, both federal labor policy and the conservation of judicial resources compel that the exhaustion defense be recognized in all breach of fair duty/breach of contract actions and that defendant employers, as well as defendant unions, be afforded the benefit of that defense.

3. Nonintervention Theory.

The court below acknowledged that, "a primary reason for requiring exhaustion is to forestall unnecessary interference with union affairs." 623 F.2d at 566. This view finds abundant support in decisions in other federal courts. See, e.g., *Geddes v. Chrysler Corp., supra; Baldini v. Local Union No. 1095, UAW, supra; Harrison v. Chrysler Corp., supra; Anderson v. Grocer's Supply Co., Inc., supra; Aldridge v. Ludwig Honold Mfg. Co.,* 385 F.Supp. 695 (E.D. Pa. 1974). This reason for recognizing the exhaustion defense applies with equal force in the case of employer defendants as it does in the case of union defendants. *Vaca v. Sipes, supra,* clearly established that a Section 301 action alleging breach of contract *cannot* be successfully maintained against an employer *unless* the plaintiff establishes, as a prerequisite, that his union breached its duty of fair representation toward him and that the plaintiff was thereby prevented from pursuing any

available contractual grievance and arbitration procedure. As stated by the court in that decision:

> ". . . [W]e think the wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, *provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance.*" 386 U.S. at 186.

This means that should the cause of action against the union be dismissed in a breach of fair duty/breach of contract action, the court will *still* have to resolve the merits of the dismissed action against the union *before* disposition of the remaining cause against the employer. Dismissal of a union defendant without dismissing the employer defendant does *not* preclude "interference with union affairs." To the contrary, it potentially causes far greater interference. The internal operations of the dismissed defendant union will be scrutinized and second-guessed *without* the benefit of the union's full participation as a party to the litigation. The interference under this circumstance is likely to be more extreme and misconstruction of internal union affairs and operations is more prone to occur. In sum, the appropriate federal interest of forestalling unnecessary interference with union affairs can only be served if both employers and unions are permitted to assert the exhaustion defense, thereby making certain that union operations and the exercise of union discretion will not be scrutinized before appropriate union officials have had an opportunity to review and comment on the operations of their own organization.

4. Essential Element Theory.

As discussed in the foregoing sections, intra-union remedies must be regarded as one element of an integrated

collective bargaining process. As stated in Section A, 1, *supra,* in most cases employers have a contractual right to see that intra-union procedures are exhausted, where available, in order to secure fair representation. As stated in Section A, 2, *supra,* intra-union appeals frequently play a part in the dispute resolution process and may often serve as the catalyst for voluntary resolution of disputes. In light of these facts, it is inappropriate to regard the exhaustion defense as a *procedural* defense in a breach of fair duty/breach of contract action. In truth, no cause of action for breach of a union's duty of fair representation or a breach of contract can *arise* until this critical aspect of the collective bargaining process has been exhausted, thereby affording the grievance and arbitration procedure a full opportunity to operate effectively and affording union officers a full opportunity to display their good or bad faith. Several federal courts have analyzed the exhaustion defense in this fashion. See, e.g., *Dezura v. Firestone Tire & Rubber Co.*, 470 F.Supp. 121 (E.D. Pa. 1979); *Aldridge v. Ludwig Honold Mfg. Co., supra.* A similar view was stated in *Brookins v. Chrysler Corp.*, 381 F.Supp. 563, 568 (E.D. Mich. 1974) as follows:

> "By exhausting his internal remedies the employee may be able to eliminate the very wrong of which he complains, not merely obtain a remedy therefore in another form. If the union's wrongful refusal to continue the grievance were reversed without prejudice to his rights, the employee would no longer have a cause of action for breach of the duty of fair representation, and consequently would have no right under *Vaca* to sue his employer for breach of contract." 381 F.Supp. at 569.

The court below noted the persuasiveness of the foregoing analysis but ultimately found that, "it does not apply in instances when the employee, by exhausting intra-union

remedies, would not 'be able to eliminate the very wrong of which he [or she] complains.'" 623 F.2d at 569. This limited application of the reasoning set forth in *Brookins v. Chrysler Corp., supra,* is inappropriate for the reasons fully explained in Section A, 2, *supra.* If promptly pursued, intra-union appeals are quite likely to produce voluntary resolution of meritorious claims. Where potential co-defendants are parties to an ongoing collective bargaining relationship there is generally substantial opportunity to resolve such meritorious claims in the give and take of bargaining on outstanding disputes. *Unless* union officials are provided with an opportunity to pursue this avenue of resolution, a breach of the duty of fair representation cannot be found to have taken place. *Vaca v. Sipes, supra,* recognizes that full enhancement of all settlement possibilities is a critical element in the statutory interests served by federal labor policy and, in light of this fact, the exhaustion defense should be recognized as a valid defense available to both unions and employers in all cases where intra-union appeals exist as part of an ongoing collective bargaining relationship.

B. A Contrary Result Would Produce Three Adverse Consequences.

The decision of the Court of Appeals in this matter produces three adverse consequences which are totally deplorable. If the approach followed in the present case is adopted and followed in all similar cases, it will: 1) operate to the extreme prejudice of employers sued for breach of contract, 2) incite collusion between plaintiffs and unions inclined to permit a finding that they have breached the duty of fair representation when, in fact, no such breach has occurred, and 3) render litigation in this area unduly complex.

The prejudice to employers which results from the decision below is acknowledged by the Court of Appeals (623 F.2d at 570). The extreme nature of that prejudice is not, however, acknowledged. The decision finds that dismissal of the UAW was required in light of Clayton's failure to exhaust intra-union appeals because:

> "The UAW's liability (if any) for breach of its duty of fair representation would depend on the reasons for the union's withdrawal of the arbitration request. There is little in the record to indicate why the local official changed his mind and withdrew the arbitration request. But the missing motive is precisely the sort of information that an appellate body within the union would have elicited, compiling a record that would greatly assist the court now." 623 F.2d at 566.

Clayton was found precluded from asserting a breach of the UAW's duty of fair representation because he deprived the UAW of the opportunity to establish exculpatory evidence through this process. The court below, however, completely ignored the fact that ITT is *just as entitled* to any information exculpating the union which would have resulted from exhaustion of intra-union appeals as is the union itself. The decision of the Supreme Court in *Vaca v. Sipes, supra,* makes Clayton's cause of action against the company dependent upon his cause of action against the union. Clayton has no valid cause of action against the company unless he can first prove that the union *did* breach its duty of fair representation in handling his grievance. If Clayton's failure to exhaust intra-union appeals and resulting failure to afford the UAW an opportunity to produce exculpatory information through such exhaustion bars his effort to prove union liability, then it must, necessarily, be found to bar the dependent action asserted against the company. A contrary result is blatantly biased and unsup-

portable. This conclusion has been stated clearly in three separate decisions of the United States District Court for the Eastern District of Pennsylvania. *Dezura v. Firestone Tire & Rubber Co.*, 470 F.Supp. 121 (E.D. Pa. 1979); *Kobielnik v. IBT*, 470 F.Supp. 125 (E.D. Pa. 1979); *Neipert v. Arthur G. McKee & Co., supra.*

The prospect that collusion would result from the policy adopted by the Court of Appeals below is equally extreme. When a union is present as a party defendant in litigation of this type, and potentially liable for monetary damages, it clearly has a strong incentive to see that all available evidence of its good faith in processing a grievance is produced and examined. If, however, the cause of action for breach of the union's duty of fair representation is dismissed while the dependent cause of action against the employer is anomalously retained, the union loses all such incentive.

There are many situations in which the union might thereafter be inclined to withhold cooperation from the employer now left defending the union's conduct simply as the result of spite. More frequently, the union will desire to see the plaintiff, its member, prevail and will be tempted to characterize its own actions in any manner likely to produce victory. This result is particularly likely in situations in which the union has actively pursued a grievance to arbitration and the effected employee has filed a breach of fair duty/breach of contract action after losing before the arbitrator. To prevail in such an action, the employee must establish that his representation before the arbitrator was arbitrary, perfunctory or conducted in bad faith. Proof of such bad faith representation is generally difficult if union representatives offer reasonable explanations for the course of action pursued in arbitration. If, however, union representatives have no incentive

to offer such explanations, it becomes markedly more simple for the plaintiff to prevail on the basis of his own testimony. The absence of any potential monetary liability could not help but effect the contributions of union representatives in a case of this type. A union which pursued a member's grievance to arbitration would obviously desire to see that member secure the relief sought in federal court. This strong likelihood of collusion is totally unacceptable in any setting and it is certainly an unacceptable result in a type of case which is becoming increasingly prevalent.

There is a third deleterious effect resulting from the decision of the court below in this matter which further compels rejection of the analysis offered by the Court of Appeals. As noted above (Section A, 1), the employer in cases of this type nearly always possesses a contractual right to demand that the union with whom it has contracted represents members of the bargaining unit fairly. In light of this fact, it would appear that an employer found liable in a Section 301 suit in reliance upon the finding that a breach of the duty of fair representation had been committed, could properly sue the union for contribution alleging breach of that contractual commitment. Such an action would necessarily involve all factual matters presented in the Section 301 suit. Quite clearly, the analysis of the Court of Appeals below produces unduly complex litigation and a preferable approach should be sought and adopted. The preferable approach is to dismiss both the defendant union *and* the defendant employer in any case of this type in which available intra-union avenues of redress have not been exhausted.

CONCLUSION

For these and all of the foregoing reasons, Safeway Stores, Incorporated and Delta Lines, Inc. urge the Court to reverse the decision of the Court of Appeals remanding for trial on the claim against the employer only and direct entry of judgment dismissing the claim against the employer as well as the union.

Respectfully submitted,

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